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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 652.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

THE ADAMS EXPRESS COMPANY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED MAY 14, 1913.

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1 *No. 863.*

UNITED STATES OF AMERICA,
Southern District of Ohio, Western Division, ss:

In the district court of the United States in and for the district and division aforesaid.

Present: The honorable Howard C. Hollister, district judge.
Among the proceedings had were the following, to wit:

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE ADAMS EXPRESS COMPANY, DEFENDANT.

Be it remembered that heretofore, to wit, on the twenty-second day of February, in the year of our Lord one thousand nine hundred and twelve, came the grand jurors of the United States of America, within and for the southern district of Ohio, and presented to the court here their certain bill of indictment herein, which said bill of indictment is clothed in the words and figures following, to wit:

2 THE UNITED STATES OF AMERICA,
Western Division of the Southern District of Ohio, ss:

In the district court of the United States within and for the western division of the southern district of Ohio, in the sixth judicial circuit, of the term of February, in the year of our Lord one thousand nine hundred and twelve.

FIRST COUNT.

Act approved February 4, 1887, and acts amendatory thereof and supplemental thereto.

1.

The grand jurors of the United States of America, duly empaneled, sworn, and charged to inquire within and for the western division of the southern district of Ohio, upon their oaths and affirmations present that throughout the period of time from and including the first day of September, nineteen hundred and ten, to and including the thirtieth day of October, nineteen hundred and eleven, The Adams Express Company was a joint stock association organized and existing under and by virtue of the common law of the State of New York, and was engaged in the transportation of property by express as a common carrier from a point on its express route, to wit, Indianapolis, in the State of Indiana, wholly by railroad into and through the county of Preble, in the State of Ohio, in the western

division of the southern district of the State of Ohio, to another point on its route, to wit, Franklin, in the State of Pennsylvania; and that so said The Adams Express Company was a common carrier subject to the provisions of the act of Congress approved February 4, 1887, entitled "An act to regulate commerce," and to the acts of Congress amendatory thereof and supplemental thereto.

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2.

That before said period said The Adams Express Company had established its rates and charges for the transportation of certain property, to wit, merchandise of a value of not exceeding fifty dollars ($50.00) on each shipment of one hundred pounds or less, and not exceeding fifty cents (50¢) per pound, actual weight, on each shipment weighing more than one hundred pounds, from Indianapolis aforesaid to Franklin aforesaid, and as in that behalf required by law had before said period filed with the Interstate Commerce Commission of the United States, and printed and kept open to public inspection, its schedules of rates and charges (which are too voluminous to be herein set forth in full), which said schedules then and there showed the rates and charges of said common carrier for the transportation from said Indianapolis to said Franklin in interstate commerce as aforesaid of merchandise of the value of not exceeding fifty dollars ($50.00) on each shipment of one hundred pounds or less, and not exceeding fifty cents (50¢) per pound, actual weight, on each shipment weighing more than one hundred pounds, to be as follows:

Packages weighing—	Cents.
Not over 1 pound	25
Over 1 pound, not over 2 pounds	30
" 2 " " " 3 "	40
" 3 " " " 4 "	45
" 6 " " " 7 "	55
" 7 " " " 8 "	60
" 12 " " " 13 "	65
" 18 " " " 19 "	75
" 21 " " " 22 "	85
Packages weighing 180 pounds	315
" " 375 "	656

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3.

That the said rates and charges for such transportation in such quantities between said Indianapolis and said Franklin remained unchanged and in force until and including the time of the transportation hereinafter in this count alleged, and became and were, on the date thereof, the highest and only legal rates and charges for the transportation of such property.

4.

That during said period of time, to wit, on or about the twenty-seventh day of September, nineteen hundred and ten, said The Adams

Express Company, at Indianapolis aforesaid, did receive from the consignor thereof, whose name is unknown to said jurors, one package of merchandise of a value not exceeding fifty dollars ($50.00) and then and there weighing seven pounds, and no more, for continuous carriage and shipment thereof by said common carrier by express, in interstate commerce as aforesaid, and into and through the county of Preble and State of Ohio, in the western division of the southern district of Ohio, and within the jurisdiction of this court, to said Franklin, to be there delivered to one Mrs. T. Sullivan; and the said The Adams Express Company did then and there transport said merchandise by express from said Indianapolis and into and through the said county of Preble and State of Ohio, in interstate commerce as aforesaid, to said Franklin.

5.

That on or about said twenty-seventh day of September, nineteen hundred and ten, at Indianapolis aforesaid, said The Adams Express Company did receive said merchandise from said consignor and then and there unlawfully did knowingly and wilfully charge, demand, collect, and receive from said consignor, whose name is unknown to the said jurors, as and for the rate and charge due the said The Adams Express Company for said transportation of said merchandise from said Indianapolis to said Franklin, in interstate commerce as aforesaid, a sum greater by five cents (5¢) than said lawful charge of fifty-five cents (55¢), to wit, the sum of sixty cents (60¢), and that said sum of five cents (5¢) was so, as aforesaid, charged, demanded, collected, and received by said The Adams Express Company, whereas said The Adams Express Company then and there well knew the highest and only legal charge for the transportation aforesaid was fifty-five cents.

6.

Whereby and by so charging, demanding, collecting, and receiving said greater sum as aforesaid said The Adams Express Company unlawfully did knowingly and wilfully charge, demand, collect, and receive a greater compensation for said transportation of said merchandise from said Indianapolis to said Franklin, in interstate commerce as aforesaid, than the rate and charge specified in said schedules filed as aforesaid and in effect at the time of said transportation as said The Adams Express Company then and there at the time of charging, demanding, collecting, and receiving said greater sum well knew, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

6 SECOND COUNT.

Act approved February 4, 1887, and acts amendatory thereof and supplemental thereto.

1.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present that they adopt into this the second count of this indictment, and make a part hereof, and incorporate hereinto as though the same were repeated herein, each and all of the statements and allegations contained within the first count hereof, included and comprised within paragraph numbered one, two, and three of said first count, and do upon their oaths present each and all of said statements and allegations in said paragraphs contained to be true for the purposes of this count.

2.

That during said period of time, to wit, on or about the third day of October, nineteen hundred and ten, said The Adams Express Company, at Indianapolis aforesaid, did receive from the consignor thereof, whose name is unknown to the said jurors, one package of merchandise of a value not exceeding fifty dollars ($50.00) and then and there weighing three and one-half pounds and no more, for continuous carriage and shipment thereof by said common carrier by express, in interstate commerce as aforesaid and into and through the county of Preble and State of Ohio, in the western division of the southern district of Ohio, and within the jurisdiction of this court, to said Franklin, to be there delivered to one J. T. Campbell; and the said The Adams Express Company did then and there transport said merchandise by express from said Indianapolis and into and through the said county of Preble and State of Ohio, in interstate commerce as aforesaid, to said Franklin.

3.

That on or about said third day of October, nineteen hundred and ten, at Indianapolis aforesaid, said The Adams Express Com-
7 pany did receive said merchandise from said consignor and then and there unlawfully did knowingly and wilfully charge, demand, collect, and receive from said consignor, whose name is unknown to said jurors, as and for the rate and charge due the said The Adams Express Company for said transportation of said merchandise from said Indianapolis to said Franklin, in interstate commerce as aforesaid, a sum greater by five cents (5¢) than said lawful charge of forty-five cents (45¢), to wit, the sum of fifty cents (50¢), and that said sum of five cents (5¢) was so as aforesaid charged, demanded, collected, and received by said The Adams Ex-

press Company; whereas said The Adams Express Company then and there well knew the highest and only legal charge for the transportation aforesaid was forty-five cents.

4.

Whereby and by so charging, demanding, collecting, and receiving said greater sum as aforesaid said The Adams Express Company unlawfully did knowingly and wilfully charge, demand, collect, and receive a greater compensation for said transportation of said merchandise from said Indianapolis to said Franklin, in interstate commerce as aforesaid, than the rate and charge specified in said schedules filed as aforesaid and in effect at the time of said transportation as said The Adams Express Company then and there at the time of charging, demanding, collecting, and receiving said greater sum well knew, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

8 THIRD COUNT.

Act approved February 4, 1887, and acts amendatory thereof and supplemental thereto.

1.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present that they adopt into this the third count of this indictment, and make a part hereof, and incorporate hereinto as though the same were repeated herein, each and all of the statements and allegations contained within the first count hereof included and comprised within paragraphs numbered one, two, and three of said first count, and do upon their oaths present each and all of said statements and allegations in said paragraphs contained to be true for the purposes of this count.

2.

That during said period of time, to wit, on or about the fifth day of January, nineteen hundred and eleven, said The Adams Express Company, at Indianapolis aforesaid, did receive from the consignor thereof, whose name is unknown to the said jurors, one package of merchandise of a value not exceeding fifty dollars ($50.00), and then and there weighing three pounds and no more, for continuous carriage and shipment thereof by said common carrier by express, in interstate commerce as aforesaid, and into and through the county of Preble and State of Ohio in the western division of the southern district of Ohio, and within the jurisdiction of this court, to said Franklin, to be there delivered to one C. Lan Cartos; and the said

The Adams Express Company did then and there transport said merchandise by express from said Indianapolis and into and through the said county of Preble and State of Ohio, in interstate commerce as aforesaid, to said Franklin.

3.

That on or about said fifth day of January, nineteen hundred and eleven, at Indianapolis aforesaid, said The Adams Express Company did receive said merchandise from said consignor and then and there unlawfully did knowingly and wilfully charge, demand, col-
9 lect, and receive from said consignor, whose name is unknown to said jurors, as and for the rate and charge due the said The Adams Express Company for said transportation of said merchandise from said Indianapolis to said Franklin, in interstate commerce as aforesaid, a sum greater by five cents (5¢) than said lawful charge of forty cents (40¢), to wit, the sum of forty-five cents (45¢), and that said sum of five cents (5¢) was so, as aforesaid, charged, demanded, collected, and received by said The Adams Express Company; whereas said The Adams Express Company then and there well knew the highest and only legal charge for the transportation aforesaid was forty cents.

4.

Whereby and by so charging, demanding, collecting, and receiving said greater sum as aforesaid said The Adams Express Company unlawfully did knowingly and wilfully charge, demand, collect, and receive a greater compensation for said transportation of said merchandise from said Indianapolis to said Franklin, in interstate commerce as aforesaid, than the rate and charge specified in said schedules filed as aforesaid and in effect at the time of said transportation as said The Adams Express Company then and there at the time of charging, demanding, collecting, and receiving said greater sum well knew, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

10 FOURTH COUNT.

Act approved February 4, 1887, and acts amendatory thereof and supplemental thereto.

1.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present that they adopt into this the fourth count of this indictment and make a part hereof and incorporate hereinto, as though the same were repeated herein, each and all of the

statements and allegations contained within the first count hereof included and comprised within paragraphs numbered one, two, and three of said first count, and do upon their oaths present each and all of said statements and allegations in said paragraphs contained to be true for the purposes of this count.

2.

That during said period of time, to wit, on or about the second day of September, nineteen hundred and ten, said The Adams Express Company, at Indianapolis aforesaid, did receive from the consignor thereof, whose name is unknown to the said jurors, one package of merchandise of a value not exceeding fifty dollars ($50.00) and then and there weighing one and one-half pounds and no more, for continuous carriage and shipment thereof by said common carrier by express in interstate commerce as aforesaid, and into and through the county of Preble and State of Ohio, in the western division of the southern district of Ohio, and within the jurisdiction of this court, to said Franklin, to be there delivered to one M. Miller; and the said The Adams Express Company did then and there transport said merchandise by express from said Indianapolis and into and through the said county of Preble and State of Ohio, in interstate commerce as aforesaid, to said Franklin.

3.

That thereafter, to wit, on or about the fifth day of September, nineteen hundred and ten, at Franklin aforesaid, said The
11 Adams Express Company did deliver said merchandise from said Indianapolis to said Franklin, in interstate commerce as aforesaid, a sum greater by five cents (5¢) than said lawful charge of thirty cents (30¢), to wit, the sum of thirty-five cents (35¢), and that said sum of five cents (5¢) was so, as aforesaid, charged, demanded, collected, and received by said The Adams Express Company; whereas said The Adams Express Company then and there well knew the highest and only legal charge for the transportation aforesaid was thirty cents.

4.

Whereby and by so charging, demanding, collecting, and receiving said greater sum as aforesaid said The Adams Express Company unlawfully did knowingly and wilfully charge, demand, collect, and receive a greater compensation for said transportation of said merchandise from said Indianapolis to said Franklin, in interstate commerce as aforesaid, than the rate and charge specified in said schedules filed as aforesaid and in effect at the time of said transportation, as said The Adams Express Company then and there, at the time of charging, demanding, collecting, and receiving said greater sum, well

knew, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

12 FIFTH COUNT.

Act approved February 4, 1887, and acts amendatory thereof and supplemental thereto.

1.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present that they adopt in this the fifth count of this indictment, and make a part hereof, and incorporate hereinto as though the same were repeated herein, each and all of the statements and allegations contained within the first count hereof included and comprised within paragraphs numbered one, two, and three of said first count, and do upon their oaths present each and all of said statements and allegations in said paragraphs contained to be true for the purpose of this count:

2.

That during said period of time, to wit, on or about the eighth day of September, nineteen hundred and ten, said the Adams Express Company, at Indianapolis aforesaid, did receive from the consignor thereof, whose name is unknown to the said jurors, one package of merchandise of a value not exceeding fifty dollars ($50.00), and then and there weighing four pounds and no more, for continuous carriage and shipment thereof by said common carrier by express, in interstate commerce as aforesaid, and into and through the county of Preble and State of Ohio, in the western division of the southern district of Ohio, and within the jurisdiction of this court, to said Franklin, to be there delivered to the Colburn Machine Tool Company; and the said the Adams Express Company did then and there transport said merchandise by express from said Indianapolis and into and through the said county of Preble and State of Ohio, in interstate commerce as aforesaid, to said Franklin.

3.

That thereafter, to wit, on or about the tenth day of September, nineteen hundred and ten, at Franklin aforesaid, said the Adams Express Company did deliver said merchandise to said Colburn
13 Machine Tool Company, the consignee thereof, and then and there unlawfully did knowingly and wilfully charge, demand, collect, and receive from said consignee, as and for the rate and charge due the said The Adams Express Company for said transpor-

tation of said merchandise from said Indianapolis to said Franklin, in interstate commerce as aforesaid, a sum greater by five cents (5 ¢.) than said lawful charge of forty-five cents (45 ¢.), to wit, the sum of fifty cents (50 ¢.), and that said sum of five cents (5 ¢.) was so as aforesaid charged, demanded, collected, and received by said The Adams Express Company; whereas said The Adams Express Company then and there well knew the highest and only legal charge for the transportation aforesaid was forty-five cents.

4.

Whereby and by so charging, demanding, collecting, and receiving said greater sum as aforesaid said The Adams Express Company unlawfully did knowingly and wilfully charge, demand, collect, and receive a greater compensation for said transportation of said merchandise from said Indianapolis to said Franklin, in interstate commerce as aforesaid, than the rate and charge specified in said schedules filed as aforesaid and in effect at the time of said transportation as said The Adams Express Company then and there at the time of charging, demanding, collecting, and receiving said greater sum well knew, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

14 SIXTH COUNT.

Act approved February 4, 1887, and acts amendatory thereof and supplemental thereto.

1.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present that they adopt into this the sixth count of this indictment and make a part hereof, and incorporate hereinto as though the same were repeated herein, each and all of the statements and allegations contained within the first count hereof included and comprised within paragraphs numbered one, two, and three of said first count, and do upon their oaths present each and all of said statements and allegations in said paragraphs contained to be true for the purposes of this count:

2.

That during said period of time, to wit, on or about the twelfth day of September, nineteen hundred and ten, said The Adams Express Company, at Indianapolis aforesaid, did receive*d* from the consignor thereof, whose name is unknown to the said jurors, one package of merchandise of a value not exceeding fifty dollars ($50.00) and then and there weighing eight pounds and no more, for continuous carriage and shipment thereof by said common carrier by

express, in interstate commerce as aforesaid, and into and through the county of Preble and State of Ohio, in the western division of the southern district of Ohio, and within the jurisdiction of this court, to said Franklin, to be there delivered to Printz Bros.; and the said The Adams Express Company did then and there transport said merchandise by express from said Indianapolis and into and through the said county of Preble and State of Ohio, in interstate commerce as aforesaid, to said Franklin.

3.

That thereafter, to wit, on or about the thirteenth day of September, nineteen hundred and ten, at Franklin aforesaid, said The Adams Express Company did deliver said merchandise to said Printz Bros., the consignee thereof, and then and there unlawfully did knowingly and wilfully charge, demand, collect, and receive from said consignee, as and for the rate and charge due the said The Adams Ex-
15 press Company for said transportation of said merchandise from said Indianapolis to said Franklin, in interstate commerce as aforesaid, a sum greater by ten cents (10 ¢.) than said lawful charge of sixty cents (60 ¢.), to wit, the sum of seventy cents (70 ¢.), and that said sum of ten cents (10 ¢.) was so as aforesaid charged, demanded, collected, and received by said The Adams Express Company; whereas said The Adams Express Company then and there well knew the highest and only legal charge for the transportation aforesaid was sixty cents.

4.

Whereby and by so charging, demanding, collecting, and receiving said greater sum as aforesaid said The Adams Express Company unlawfully did knowingly and wilfully charge, demand, collect, and receive a greater compensation for said transportation of said merchandise from said Indianapolis to said Franklin, in interstate commerce as aforesaid, than the rate and charge specified in said schedules filed as aforesaid and in effect at the time of said transportation as said The Adams Express Company then and there at the time of charging, demanding, collecting, and receiving said greater sum well knew, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

16 SEVENTH COUNT.

Act approved February 4, 1887, and acts amendatory thereof and supplemental thereto.

1.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present that they adopt into this the seventh

count of this indictment, and make a part hereof and incorporate hereinto as though the same were repeated herein, each and all of the statements and allegations contained within the first count hereof included and comprised within paragraphs numbered one, two, and three of said first count, and do upon their oaths present each and all of said statements and allegations in said paragraphs contained to be true for the purposes of this count.

2.

That during said period of time, to wit, on or about the twenty-sixth day of September, nineteen hundred and ten, said The Adams Express Company at Indianapolis aforesaid did receive from the consignor thereof, whose name is unknown to the said jurors, one package of merchandise of a value not exceeding fifty dollars ($50.00) and then and there weighing four pounds and no more, for continuous carriage and shipment thereof by said common carrier by express, in interstate commerce as aforesaid and into and through the county of Preble and State of Ohio, in the western division of the southern district of Ohio, and within the jurisdiction of this court, to said Franklin, to be there delivered to one C. Miller; and the said The Adams Express Company did then and there transport said merchandise by express from said Indianapolis and into and through the said county of Preble and State of Ohio, in interstate commerce as aforesaid, to said Franklin.

3.

That thereafter, to wit, on or about the twenty-seventh day of September, nineteen hundred and ten, at Franklin aforesaid, said The Adams Express Company did deliver said merchandise to said C. Miller, the consignee thereof, and then and there unlawfully did knowingly and wilfully charge, demand, collect, and receive from said consignee, as and for the rate and charge due the said The
17 Adams Express Company for said transportation of said merchandise from said Indianapolis to said Franklin, in interstate commerce as aforesaid, a sum greater by five cents (5¢) than said lawful charge of forty-five cents, to wit, the sum of fifty cents (50¢), and that said sum of five cents (5¢) was so as aforesaid charged, demanded, collected, and received by said The Adams Express Company; whereas, said The Adams Express Company then and there well knew the highest and only legal charge for the transportation aforesaid was forty-five cents.

4.

Whereby and by so charging, demanding, collecting, and receiving said greater sum as aforesaid said The Adams Express Company unlawfully did knowingly and wilfully charge, demand, collect, and receive a greater compensation for said transportation of said mer-

chandise from said Indianapolis to said Franklin, in interstate commerce as aforesaid, than the rate and charge specified in said schedules filed as aforesaid and in effect at the time of said transportation as said The Adams Express Company then and there at the time of charging, demanding, collecting, and receiving said greater sum well knew contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

18 EIGHTH COUNT.

Act approved February 4, 1887, and acts amendatory thereof and supplemental thereto.

1.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present that they adopt into this the eighth count of this indictment, and make a part hereof, and incorporate hereinto as though the same were repeated herein, each and all of the statements and allegations contained within the first count hereof, included and comprised within paragraphs numbered one, two, and three of said first count, and do upon their oaths present each and all of said statements and allegations in said paragraphs contained to be true for the purposes of this count.

2.

That during said period of time, to wit, on or about the fifth day of October, nineteen hundred and ten, said The Adams Express Company, at Indianapolis aforesaid, did receive from the consignor thereof, whose name is unknown to the said jurors, two (2) bundles of merchandise of a value not exceeding fifty cents (50¢) per pound and then and there weighing one hundred and eighty pounds in the aggregate and no more, for continuous carriage and shipment thereof by said common carrier by express, in interstate commerce as aforesaid and into and through the county of Preble and State of Ohio, in the western division of the southern district of Ohio, and within the jurisdiction of this court, to said Franklin, to be there delivered to one H. Kinsley; and the said The Adams Express Company did then and there transport said merchandise by express from said Indianapolis and into and through the said county of Preble and State of Ohio, in interstate commerce as aforesaid, to said Franklin.

3.

That thereafter, to wit, on or about the sixth day of October, nineteen hundred and ten, at Franklin aforesaid, said The Adams
19 Express Company did deliver said merchandise to said H. Kinsley, the consignee thereof, and then and there unlawfully did knowingly and wilfully charge, demand, collect, and receive from

said consignee, as and for the rate and charge due the said The Adams Express Company for said transportation of said merchandise from said Indianapolis to said Franklin, in interstate commerce as aforesaid, a sum greater by forty-five cents (45¢) than said lawful charge of three dollars and fifteen cents ($3.15), to wit, the sum of three dollars and sixty cents ($3.60), and that said sum of forty-five cents (45¢) was so as aforesaid charged, demanded, collected, and received by said The Adams Express Company; whereas said The Adams Express then and there well knew the highest and only legal charge for the transportation aforesaid was three dollars and fifteen cents.

4.

Whereby and by so charging, demanding, collecting, and receiving said greater sum as aforesaid said The Adams Express Company unlawfully did knowingly and wilfully charge, demand, collect, and receive a greater compensation for said transportation of said merchandise from said Indianapolis to said Franklin, in interstate commerce as aforesaid, than the rate and charge specified in said schedules filed as aforesaid and in effect at the time of said transportation as said The Adams Express Company then and there at the time of charging, demanding, collecting, and receiving said greater sum well knew contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

20 NINTH COUNT.

Act approved February 4, 1887, and acts amendatory thereof and supplemental thereto.

1.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present that they adopt into this the ninth count of this indictment, and make a part hereof and incorporate hereinto as though the same were repeated herein, each and all of the statements and allegations contained within the first count hereof included and comprised within paragraphs numbered one, two, and three of said first count, and do upon their oaths present each and all of said statements and allegations in said paragraphs contained to be true for the purposes of this count:

2.

That during said period of time, to wit, on or about the second day of September, nineteen hundred and eleven, said The Adams Express Company, at Indianapolis aforesaid, did receive from the

consignor thereof, whose name is unknown to the said jurors, one package of merchandise of a value not exceeding fifty dollars ($50.00), and then and there weighing nineteen pounds and no more, for continuous carriage and shipment thereof by said common carrier by express in interstate commerce as aforesaid and into and through the county of Preble and State of Ohio, in the western division of the southern district of Ohio, and within the jurisdiction of this court, to said Franklin, to be there delivered to the Chicago Pneumatic Tool Company; and the said The Adams Express Company did then and there transport said merchandise by express from said Indianapolis and into and through the said county of Preble and State of Ohio, in interstate commerce as aforesaid, to said Franklin.

3.

That thereafter, to wit, on or about the fifth day of September, nineteen hundred and eleven, at Franklin aforesaid, said The Adams Express Company did deliver said merchandise to said Chi-
21 cago Pneumatic Tool Company, the consignee thereof, and thereafter, to wit, on or about the sixth day of October, nineteen hundred and eleven, at said Franklin, unlawfully did knowingly and wilfully charge, demand, collect, and receive from said consignee, as and for the rate and charge due the said The Adams Express Company for said transportation of said merchandise from said Indianapolis to said Franklin, in interstate commerce as aforesaid, a sum greater by ten cents (10¢) than said lawful charge of seventy-five cents (75¢), to wit, the sum of eighty-five cents (85¢), and that said sum of ten cents (10¢) was so as aforesaid charged, demanded, collected, and received by said The Adams Express Company; whereas said The Adams Express Company then and there well knew the highest and only legal charge for the transportation aforesaid was seventy-five cents.

4.

Whereby and by so charging, demanding, collecting, and receiving said greater sum as aforesaid said The Adams Express Company unlawfully did knowingly and wilfully charge, demand, collect, and receive a greater compensation for said transportation of said merchandise from said Indianapolis to said Franklin, in interstate commerce as aforesaid, than the rate and charge specified in said schedules filed as aforesaid and in effect at the time of said transportation as said The Adams Express Company then and there at the time of charging, demanding, collecting, and receiving said greater sums well knew, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

22 TENTH COUNT.

Act approved February 4, 1887, and acts amendatory thereof and supplemental thereto.

1.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present that they adopt into this the tenth count of this indictment, and make a part hereof, and incorporate hereinto as though the same were repeated herein, each and all of the statements and allegations contained within the first count hereof included and comprised within paragraphs numbered one, two, and three of said first count, and do upon their oaths present each and all of said statements and allegations in said paragraphs contained to be true for the purposes of this count.

2.

That during said period of time, to wit, on or about the eleventh day of September, nineteen hundred and eleven, said The Adams Express Company, at Indianapolis aforesaid, did receive from the consignor thereof, whose name is unknown to the said jurors, one package of merchandise of a value not exceeding fifty dollars ($50.00) and then and there weighing thirteen pounds, and no more, for continuous carriage and shipment thereof by said common carrier by express, in interstate commerce as aforesaid and into and through the county of Preble and State of Ohio, in the western division of the southern district of Ohio, and within the jurisdiction of this court, to said Franklin, to be there delivered to one C. A. Miller; and the said The Adams Express Company did then and there transport said merchandise by express from said Indianapolis and into and through the said county of Preble and State of Ohio, in interstate commerce as aforesaid, to said Franklin.

3.

That thereafter, to wit, on or about the twelfth day of September, nineteen hundred and eleven, at Franklin aforesaid, said The Adams Express Company did deliver said merchandise to said C. A.
23 Miller, the consignee thereof, and then and there unlawfully did knowingly and wilfully charge, demand, collect, and receive from said consignee, as and for the rate and charge due the said The Adams Express Company for said transportation of said merchandise from said Indianapolis to said Franklin, in interstate commerce as aforesaid, a sum greater by ten cents (10¢) than said lawful charge of sixty-five cents (65¢), to wit, the sum of seventy-five cents (75¢), and that said sum of ten cents (10¢) was so as aforesaid charged, demanded, collected, and received by said The Adams Express Company; whereas said The Adams Express Company then

and there well knew the highest and only legal charge for the transportation aforesaid was sixty-five cents.

4.

Whereby and by so charging, demanding, collecting, and receiving said greater sum as aforesaid said The Adams Express Company unlawfully did knowingly and wilfully charge, demand, collect, and receive a greater compensation for said transportation of said merchandise from said Indianapolis to said Franklin, in interstate commerce as aforesaid, than the rate and charge specified in said schedules filed as aforesaid and in effect at the time of said transportation as said The Adams Express Company then and there at the time of charging,. demanding, collecting, and receiving said greater sum well knew, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

24 ELEVENTH COUNT.

Act approved February 4, 1887, and acts amendatory thereof and supplemental thereto.

1.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present that they adopt into this the eleventh count of this indictment, and make a part hereof, and incorporate hereinto as though the same were repeated herein, each and all of the statements and allegations contained within the first count hereof included and comprised within paragraphs numbered one, two, and three, of said first count, and do upon their oaths present each and all of said statements and allegations in said paragraphs contained to be true for the purpose of this count.

2.

That during said period of time, to wit, on or about the sixteenth day of September, nineteen hundred and eleven, said The Adams Express Company, at Indianapolis aforesaid, did receive from the consignor thereof, whose name is unknown to the said jurors, one package of merchandise of a value not exceeding fifty cents (50¢) per pound, actual weight, and then and there weighing three hundred and seventy-five (375) pounds and no more, for continuous carriage and shipment thereof by said common carrier by express, in interstate commerce as aforesaid and into and through the county of Preble and State of Ohio, in the western division of the southern district of Ohio, and within the jurisdiction of this court, to said Franklin, to be there delivered to the King Auto Company; and the said The Adams Express Company did then and there transport said mer-

chandise by express from said Indianapolis and into and through the said county of Preble and State of Ohio, in interstate commerce as aforesaid, to said Franklin.

3.

That thereafter, to wit, on or about the eighteenth day of September, nineteen hundred and eleven, at Franklin aforesaid, said The Adams Express Company did deliver said merchandise to said King Auto Company, the consignee thereof, and then and there unlawfully did knowingly and wilfully charge, demand, collect, and receive from said consignee, as and for the rate and charge due the said The Adams Express Company for said transportation of said merchandise from said Indianapolis to said Franklin, in interstate commerce as aforesaid, a sum greater by ninety-four cents (94¢) than said lawful charge of six dollars and fifty-six cents ($6.56), to wit, the sum of seven dollars and fifty cents ($7.50), and that said sum of ninety-four cents (94¢) was so, as aforesaid, charged, demanded, collected, and received by said The Adams Express Company; whereas said The Adams Express Company then and there well knew the highest and only legal charge for the transportation aforesaid was six dollars and fifty-six cents.

4.

Whereby and by so charging, demanding, collecting, and receiving said greater sum as aforesaid The Adams Express Company unlawfully did knowingly and wilfully charge, demand, collect, and receive a greater compensation for said transportation of said merchandise from said Indianapolis to said Franklin, in interstate commerce as aforesaid, than the rate and charge specified in said schedules filed as aforesaid and in effect at the time of said transportation as said The Adams Express Company then and there at the time of charging, demanding, collecting, and receiving said greater sum well knew, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

SHERMAN T. MCPHERSON,
United States Attorney.
S. D. O.

The following endorsement appears on the back of said indictment:

(Endorsement:) No. 863. United States District Court, Southern District of Ohio, Western Division. The United States of America vs. The Adams Express Company. Indictment. For violation of act of February 4, 1887, entitled "An act to regulate commerce," and acts amendatory thereof and supplementary thereto. A true bill, Benton S. Hewitt, foreman. Filed Feb. 22, 1912. B. E. Dilley, clerk. Sherman T. McPherson, United States attorney. S. D. O.

27 And afterwards, to wit, on the 16th day of March, A. D. 1912, an order was made upon the journal of said court in said cause, which said order is clothed in the words and figures following, to wit:

ENTRY, 10–549.

THE UNITED STATES OF AMERICA, *vs.* THE ADAMS EXPRESS COMPANY.	United States District Court, Southern District of Ohio, Western Division.

Order.

Upon motion of the United States attorney for an order directing that a summons be issued for the defendant in this case, the court, on consideration thereof, doth order that the clerk issue a summons in this case for the defendant herein, to be served upon said defendant according to law and directing it to be and appear in the court room of the United States district court for this division and district on the thirtieth day of March, 1912, at ten o'clock a. m.; and that said summons set out that defendant is charged with a violation of the act of Congress of February 4, 1887, entitled "An act to regulate commerce," and the acts amendatory thereof and supplementary thereto; and that for a more complete statement of said charge defendant is referred to the indictment filed herein.

And thereupon there was issued out of the clerk's office of the court aforesaid our certain writ of summons in this case, directed to the marshal of this district and against the said defendant, which said summons is clothed in the words and figures following, to wit:

Summons issued.

THE UNITED STATES OF AMERICA,
Southern District of Ohio, Western Division, ss:

The President of the United States of America to the marshal of the southern district of Ohio, greeting:

28 You are commanded to notify The Adams Express Company, a joint stock association, organized and existing under and by the laws of the State of New York, to be and appear in the court room of the District Court of the United States for the Western Division of the Southern District of Ohio, at Cincinnati, Ohio, on the 30th day of March, A. D. 1912, at ten o'clock a. m., to answer to a certain indictment presented to said court against it by the grand jurors of the United States for the district and division aforesaid, charging said defendant, The Adams Express Company, with a violation of the act of Congress of February 4, 1887, entitled "An

act to regulate commerce," and the acts amendatory thereof and supplementary thereto, and for a more complete statement of said charge defendant is referred to the indictment filed herein.

Witness, the Honorable Howard C. Hollister, judge of the district court of the United States, this 16th day of March, A. D. 1912, and of the independence of the United States of America the 136th.

Attest:

[SEAL.] B. E. DILLEY, *Clerk.*
By WM. F. MADDEN, *Deputy.*

And afterwards, to wit, on the 18th day of March, A. D. 1912, came the marshal of said district, to whom the said writ was in form aforesaid directed, and returned the same into the clerk's office of the court aforesaid with his proceedings endorsed thereon, clothed in the words and figures following, to wit:

Marshal's return.

Received this writ at Cincinnati, Ohio, on the 16th day of March, 1912, and on the same day I served the within named The Adams Express Company by delivering a true copy of this writ, with the endorsements thereon, to Charles F. Barrett, general agent for said company, by handing same to him personally at Cincinnati, Ohio.

29 Fees:

1 copy	$ .30
1 service	2.00
1 mile	.06
Total	$2.36

EUGENE L. LEWIS,
U. S. Marshal, S. D. O.
By W. J. SANDERSON,
Deputy.

And afterwards, to wit, on the 30th day of March, A. D. 1912, the following motion was filed in the clerk's office of said court:

Motion.

United States District Court, Southern District of Ohio, Western Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE ADAMS EXPRESS COMPANY, DEFENDANT.

Motion to set aside and quash marshal's return on summons.

Charles F. Barrett, the person on whom service of the writ of summons in this case was served on the 16th day of March, 1912, as general agent for The Adams Express Company, defendant herein,

moves the court to set aside and quash said service and the marshal's return thereon on the ground that the same are not authorized by law.

MAXWELL & RAMSEY,
Attorneys for Chas. F. Barrett.

And afterwards, to wit, on the 23rd day of April, A. D. 1912, an order was made upon the journal of said court in said cause, which said order is clothed in the words and figures following, to wit:

30 ENTRY 10-595.

United States District Court, Southern District of Ohio, Western Division.

THE UNITED STATES OF AMERICA
vs.
THE ADAMS EXPRESS COMPANY. } Entry.

This day this cause came on to be heard on the motion of Charles F. Barrett to set aside and quash the service of summons in this case and the marshal's return thereon.

Said motion was argued by counsel and submitted to the court, and the court being fully advised in the premises and treating said motion as a demurrer to the indictment, finds that the indictment can not be maintained against The Adams Express Company for the reason that it appears on the face of said indictment that the said Adams Express Company is not a corporation, but is a joint stock association, organized and existing under and by virtue of the common law of the State of New York, and for this reason the motion to quash service, treated as a demurrer to the indictment, is sustained and the defendant discharged, and the cause dismissed; to all of which the United States of America, by its counsel, excepts.

And afterwards, to wit, on the 8th day of May, A. D. 1912, came the United States of America, by its attorney, and filed in the clerk's office of said court a certain petition for writ of error in this cause, which said petition for writ of error is clothed in the words and figures following, to wit:

Petition for writ of error.

In the District Court of the United States, for the Southern District of Ohio, Western Division.

31 THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE ADAMS EXPRESS COMPANY, DEFENDANT. } Petition for writ of error.

Now comes the United States of America, plaintiff herein. and says that on the twenty-third day of April, 1912, this court entered a decision and judgment herein against the plaintiff and in favor

of the defendant, in which decision and judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, the United States of America, plaintiff herein, prays that a writ of error may issue in its behalf to the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States.

SHERMAN T. MCPHERSON,
United States Attorney for the Southern District of Ohio.

And afterwards, to wit, on the same day, came the United States of America, by its attorney, and filed in the clerk's office of the court aforesaid a certain assignment of errors in this cause, which said assignment of errors is clothed in the words and figures following, to wit:

Assignment of errors.

In the District Court of the United States, for the Southern District of Ohio, Western Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE ADAMS EXPRESS COMPANY, DEFENDANT } Assignment of errors.

32 The plaintiff in this action, in connection with its petition for a writ of error, makes the following assignment of errors, which it avers were committed by the court in its decision and judgment in this cause, to wit:

1. The court erred in its decision and judgment quashing the indictment herein and each count thereof.

2. The court erred in its decision and judgment quashing the indictment herein, and each count thereof, upon the construction of the statute upon which said indictment and each count thereof is founded.

3. The court erred in its decision and judgment sustaining a demurrer to the indictment herein and each count thereof.

4. The court erred in its decision and judgment sustaining a demurrer to the indictment herein, and each count thereof, upon the construction of the statute upon which said indictment and each count thereof is founded.

5. The court erred in its decision and judgment setting aside and dismissing the indictment herein and each count thereof.

6. The court erred in its decision and judgment setting aside and dismissing the indictment herein, and each count thereof, upon the construction of the statute upon which said indictment and each count thereof is founded.

7. The court erred in its decision and judgment discharging the defendant herein and dismissing this cause.

8. The court erred in its decision and judgment discharging the defendant herein and dismissing this cause, said decision and judgment being based upon the construction of the statute upon which the indictment herein and each count thereof is founded.

9. The court erred in its decision and judgment in this cause in not sustaining the indictment herein and each count thereof.

33 For these reasons the plaintiff, the United States of America, asks that this cause be reviewed and that such judgment be rendered in the Supreme Court of the United States as should have been rendered in the court below, and that such action be taken as will protect the rights of the plaintiff in the premises.

SHERMAN T. MCPHERSON,
United States Attorney for the Southern District of Ohio.

And afterwards, to wit, on the 8th day of May, A. D. 1912, an entry was made upon the journal of said court in said cause, which said entry is clothed in the words and figures following, to wit:

ENTRY 10–610.

The United States District Court, Southern District of Ohio, Western Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE ADAMS EXPRESS COMPANY, DEFENDANT. } Entry.

This day came the United States attorney, on behalf of the plaintiff, and presented for allowance a petition for writ of error herein and an assignment of errors accompanying the same, upon consideration of which the court hereby allows said petition and orders a writ of error to the Supreme Court of the United States.

And afterwards, to wit, on the same day, the following præcipe was filed in the clerk's office of said court:

United States District Court, Southern District of Ohio.

THE UNITED STATES
vs.
THE ADAMS EXPRESS COMPANY. } Criminal, No. 863.

34 *Præcipe.*

To B. E. DILLEY,
Clerk of said Court:

Please prepare a certified transcript of the entire record in this cause.

(Same to be transmitted to the United States Supreme Court, for a review of this case.)

SHERMAN T. McPHERSON,
Attorney for U. S.

35 United States District Court, Southern District of Ohio, Western Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE ADAMS EXPRESS COMPANY, DEFENDANT. } Indictment, No. 863.

THE UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

I, B. E. Dilley, clerk of the court aforesaid, do hereby certify that the foregoing is a true, correct, and complete transcript of the record and proceedings had by and before said court in the above-entitled cause, as the same appear of record and on file in the clerk's office of said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of Cincinnati, Ohio, this 10th day of May, A. D. 1912.

Attest:
[SEAL.]

B. E. DILLEY,
Clerk.
By HARRY F. RABE,
Deputy Clerk.

36 Supreme Court of the United States.

UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

The President of the United States to the honorable the judge of the District Court of the United States for the Southern District of Ohio, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you, or some of you, between The United States of America, plaintiff, and The Adams Express Company, defendant, a manifest error hath happened, to the great damage of the said The United States of America, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, to-

gether with this writ, so that you have the same at Washington, in the District of Columbia, on the seventh day of June next, in the said Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

37 Witness the Honorable Edward D. White, Chief Justice of the United States, the eighth day of May, A. D. 1912, and of the Independence of the United States of America the 136th.

[SEAL.] B. E. DILLEY,
Clerk of the District Court of the United States for the Southern District of Ohio.

Allowed by—
HOWARD C. HOLLISTER,
Judge of the District Court of the United States for the Southern District of Ohio.

38 Supreme Court of the United States.

UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

To the Adams Express Company, greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States, to be holden at the city of Washington, in the District of Columbia, on the seventh day of June next, pursuant to a writ of error, filed in the clerk's office of the District Court of the United States for the Southern District of Ohio, wherein The United States of America is plaintiff in error, and you are defendant in error to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the United States, this eighth day of May, in the year of our Lord one thousand nine hundred and twelve, and of the independence of the United States of America the one hundred and thirty-sixth.

HOWARD C. HOLLISTER,
Judge of the District Court of the United States for the Southern District of Ohio.

39 STATE OF OHIO,
County of Hamilton, ss:

On this 10th day of May, A. D. 1912, personally appeared before me, a notary public in and for said county and State, Thomas J. Sheehan, jr., and made oath that he is a clerk in the office of Sherman T. McPherson, United States attorney at Cincinnati, Ohio, and that

he delivered a copy of the foregoing citation to Mr. Joseph Graydon, of the firm of Maxwell and Ramsey, counsel for The Adams Express Company.

THOMAS J. SHEEHAN, Jr.

Sworn to and subscribed before me this 10th day of May, 1912.

[SEAL.] WM. M. COFFIN,
Notary Public in and for Hamilton County, Ohio.

40 (Indorsement on cover:) File No. 23214. S. Ohio, D. C. U. S. Term No. 652. The United States of America, plaintiff in error, *vs.* The Adams Express Company. Filed May 16, 1912. File No. 23214.

○

13

Office Supreme Court, U. S.
FILED.
JAN 6 1913
JAMES H. McKENNEY
CLERK

No. 652.

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

THE UNITED STATES, *Plaintiff in Error,*

v.

THE ADAMS EXPRESS COMPANY, *Defendant in Error.*

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

MOTION BY THE UNITED STATES TO ADVANCE.

The Solicitor General, on behalf of the United States, moves that this case (as it is here under the Criminal Appeals Act) be advanced for early hearing.

The Adams Express Company was indicted on 11 counts for demanding and receiving, in violation of the Interstate Commerce Act, greater compensation for the transportation of certain shipments than authorized by the rates specified in its schedules filed with the Interstate Commerce Commission.

The company, as alleged, is "a joint-stock association organized and existing under * * * the common law of * * * New York," and is "engaged in the transportation of property by express as a common carrier." The Interstate Commerce Act

with its amendments applies in its own terms variously to "corporations," "persons," "companies," "common carriers," and also provides that "the term 'common carrier' as used in this act shall include *express companies.*"

The question raised by the demurrer, which was sustained, is whether such a joint-stock association as the Adams Express Company, not being a corporation, is indictable as an entity for a violation of the act. There is a conflict of opinion among the lower Federal courts.

Notice of this motion has been given opposing counsel.

WM. MARSHALL BULLITT,
Solicitor General.

JANUARY 6, 1913.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1913

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In the Supreme Court of the United States.

OCTOBER TERM, 1912.

UNITED STATES, PLAINTIFF IN ERROR,
v.
THE ADAMS EXPRESS COMPANY. } No. 652.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

BRIEF FOR THE UNITED STATES.

The case comes up under the Criminal Appeals Act.

The court below held that an express company whose business organization is that of a joint-stock association is not subject as an entity to indictment for a violation of the Interstate Commerce Act.

The question of indictment, as distinguished from injunction, has not heretofore arisen under the interstate-commerce law except in *United States* v. *Adams Express Company*, 199 Fed., 321 (in which an indictment against the present defendant was sustained); but these joint-stock express companies have frequently been before this court as entities under indictment under other laws:

Adams Express Company v. *Iowa*, 196 U. S., 147;

Adams Express Company v. *Kentucky*, 206 U. S., 129;

Adams Express Company v. *Kentucky*, 206 U. S., 138;

Adams Express Company v. *Kentucky*, 214 U. S., 218;

American Express Company v. *Kentucky*, 206 U. S., 139;

American Express Company v. *Iowa*, 196 U. S., 133.

And see *United States* v. *Adams Express Co.*, 119 Fed., 240.

In *American Express Company* v. *United States*, 212 U. S., 522, civil proceedings at the suit of the United States were entertained against the present defendant and the three other great joint-stock express companies. These suits were instituted under section 3 of the Elkins Act, 32 Stat., 847, to prevent discriminations forbidden by the interstate-commerce law. The suits were brought against the companies directly in their artificial names, injunctions were issued against the companies as such, and were finally sustained by this court.

STATEMENT OF THE CASE.

The eleven counts of the indictment treat different shipments, but otherwise are substantially identical. They are typified by the first, which alleges:

1. That from September 1, 1910, to October 30, 1911, "The Adams Express Company was a joint-stock association organized and existing under and by virtue of the common law of the State of New York and was engaged in the transportation of property by express as a common carrier" from Indianapolis,

Indiana, through the Southern District of Ohio to Franklin, Pennsylvania, and so "was a common carrier subject to the provisions of the act of Congress approved February 4, 1887, entitled 'An act to regulate commerce,' and to the acts of Congress amendatory thereof and supplemental thereto." (R., 1–2.)

2. That theretofore the company had established its rates and charges for the transportation of merchandise between these points, and as required by law had filed with the Interstate Commerce Commission and printed and kept open to public inspection its schedules showing the rates and charges. The count goes on to set forth some of the pertinent rates. (R., 2.)

3. That on or about September 27, 1910, the company charged and collected, for the carriage of a certain package between the points mentioned (and through the Southern District of Ohio and so within the jurisdiction of the court), a sum greater than the rate and charge specified in its filed schedule. (R., 2–3.)

Upon the filing of the indictment an order was entered directing that a summons for the appearance of the defendant issue. (R., 18.) The summons as issued commanded the appearance of "The Adams Express Company, a joint-stock association, organized and existing under and by the laws of the State of New York." (R., 18.) It was served, as

the marshal's return showed, on the general agent of the company at Cincinnati, Ohio. (R. 19.)

Subsequently the general agent moved to set aside and quash the service of summons and the marshal's return thereon on the ground that they were not authorized by law. (R., 19–20.)

JUDGMENT OF THE LOWER COURT.

This motion was granted and the order entered recites that the court—

> *treating said motion as a demurrer to the indictment*, finds that the indictment can not be maintained against the Adams Express Company for the reason that it appears on the face of said indictment that the said Adams Express Company is not a corporation, but is a joint-stock association, organized and existing under and by virtue of the common law of the State of New York, and for this reason *the motion to quash service, treated as a demurrer to the indictment, is sustained and the defendant discharged and the cause dismissed;* to all of which the United States of America, by its counsel, excepts. (R., 20.)

The Government thereupon sued out this writ of error under the Criminal Appeals Act.

ASSIGNMENT OF ERRORS.

The assignment of errors simply asserts that the court erred in its decision as to the construction of the statute upon which the indictment was founded. It treats the decision in the alternative either as quashing the indictment, or as sustaining a demurrer

to the indictment, or as setting aside the indictment, or as discharging the defendant and dismissing the cause. (R., 21–22.)

We take the lower court's interpretation of the pleadings, however, to be binding here and so shall regard the decision as one sustaining a demurrer to the indictment.

THE QUESTION.

The precise question raised by the pleadings is whether under the Interstate Commerce Act as amended an express company whose form of association is that of the joint-stock association typified by the defendant company is subject as such to indictment for a violation of the act.

The Government will argue:

I. The Interstate Commerce Act, as amended, in terms and intent applies to the defendant company and subjects it, as a company, to the penalties prescribed for violations.

II. This is constitutional.

FIRST POINT.

The Interstate Commerce Act, as amended, in terms and intent applies to the defendant company, and subjects it as a company to the penalties prescribed for violations.

First. The words of the act are explicit to this effect.

The pertinent provisions are as follows:

> (Sec. 1, par. 1.) That the provisions of this act shall apply to * * * any common carrier or carriers engaged in the transporta-

tion of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia.

(Sec. 1, par. 2.) The term "common carrier" as used in this act shall include express companies and sleeping-car companies.

(Sec. 6, par. 7.) * * * Wherever the word "carrier" occurs in this act it shall be held to mean "common carrier."

(Sec. 10, par. 1.) That any common carrier subject to the provisions of this act, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this act prohibited or declared to be unlawful * * * shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense: *Provided*, That if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges for the transportation of passengers or property, such person

> shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court.

The provisions prescribing the particular offense charged in this indictment are as follows:

> (Sec. 6, par. 1.) That every common carrier subject to the provisions of this act shall file with the commission * * * schedules showing all the rates, fares, and charges for transportation * * *.
>
> (Sec. 6, par. 7.) * * * Nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property * * * between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time.

So far simply as the words of the statute go, there can be no doubt whatever of the propriety of the present indictment. It is important to observe that the provision is that "the *term* 'common carrier' as used in this act shall include *express companies*," not that express business shall be subject to the act, or some such phrase. Section 10, therefore, in the light of this definition section, reads for the purposes of this indictment as follows:

> That any * * * [express company] subject to the provisions of this act * * * who * * * [shall * * * charge or de-

> mand or collect or receive a greater or less or different compensation for * * * transportation * * * of property * * * between the points named in * * * tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time] * * * shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof, in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense.

Clearly, then, the words of these sections when properly and precisely correlated apply to express carriers in their associated capacity. Whether the act in terms hits individuals in the express business is another question depending on other sections. It is enough here that the act does in so many words say that if an express *company* violates any provision *it* shall be guilty of a misdemeanor.

The indictment in form responds to the common understanding of these words.

Second. The words are intended to mean what they say, and there is no basis for carving this particular express company out from their scope.

At the time when the "express companies" were brought within the scope of the act by the Hepburn law the principal companies were (and they still are) organized as follows (*see I. C. C. 1st Annual Report to Congress on the Statistics of Express Companies in the United States (1909), pp. 39–46*):

Joint-stock associations:	Corporations:
Adams.	Canadian.
American.	Canadian Northern.
National.	Globe.
United States.	Great Northern.
	Northern.
	Southern (body politic, created by Supreme Court, Va.).
	Wells, Fargo.
	Western.

As we have shown, the *words* of the act treat all companies as entities without affirmatively indicating any distinction between the left-hand column and the right-hand column.

The defendant, however, seeks to cut down this generality of language so as to differentiate the four great "express companies," which are joint stock associations, from the others, which are corporations.

More than that, it would seem necessary for the defendant to impute to Congress an intention to discriminate even more particularly. The *duties* which are cast on "express companies" are undoubtedly cast on *all* express companies and are cast on them *as* "companies" and not on their members as individuals (e. g., sec. 6, imposing the duty to file schedules[1]). Such was the view of this court, as well, apparently, as of all the counsel concerned, in *American Express Company* v. *United States*, 212 U. S., 522. The court says:

> The amendment to the interstate-commerce act by the act of June 29, 1906, c. 3591, 34

[1] And the indictment alleges that the "Adams Express Company" filed its schedules.

> Stat., 584, brought express companies within the terms of the act. The express companies were therefore obliged to file and publish their rates for the transportation of property under sec. 6 of the interstate commerce act as amended, and it is admitted in the record that they have done so (p. 531).

Apparently it must be said that Congress intended on the one hand thus to treat them as entities for these purposes, but on the other hand not as entities for the penal purposes. In other words the "companies" are supposed to be subject to the regulations but not to the remedies for their enforcement. (Cf. *Queen* v. *Commercial Co.* [1891], 2 Q. B., 588, 592 *et seq.*)

What overpowering reason exists which requires the court to limit the language chosen by Congress in order to attain results so lopsided?

Obviously the only purpose of Congress in treating any "company" as an entity is to provide a convenient handle by which to control the particular business. The prime considerations are effectiveness in the administration and enforcement of the act, and all such reasons make it important and desirable to treat the express companies on the left as entities exactly in the same degree and for the same reasons as those on the right.

In the actual everyday sense of the situation the joint-stock express companies are, of course, entities of some sort separate and distinct from their members. It is common speech and thought, both lay

and legal, that these companies are present in various States and places wherever they happen to have their offices; that they really perform acts in each of these places, shipping goods, collecting money, issuing money orders, carrying on litigation, etc.; and no one for a moment thinks of them—of the Adams Express Company in Washington, for instance—as simply a gathering of their members there for the purpose of doing business. The company is conceived of as a separate thing quite as truly as an ordinary corporation.

As, then, the words of the act lump the joint-stock express companies and the corporate express companies together, and the purposes of the act lump them together, and the substance of their nature lumps them together, we must look for reasons of a most peremptory sort to tear them apart.

But the reasons advanced are not peremptory. They possess no substantial or remedial quality which could possibly be thought to have any weight with Congress. They are entirely metaphysical, founded upon nice distinctions in legal theory, of no concern with any conceivable practical purpose of Congress.

(1) It is said that originally and up to the time of the Elkins law (of Feb. 19, 1903, 32 Stat., 847) only natural persons were indictable for violations of the interstate commerce act; that while the Elkins law did subject corporations to indictment, neither it nor any subsequent act has in terms done the same with respect to joint-stock associations, and that it still

remains true that the only artificial person indictable is the corporation.

But the Hepburn Act (of June 29, 1906, 34 Stat., 584) in declaring that the term "common carrier" should include "express companies" is surely an expression of intention to accomplish the result we contend for, if a joint-stock association may be said to be a "company."

The case of the corporation in this respect is peculiar and must be properly understood to be of help here. The reason that corporations were formerly claimed not to be indictable under this act was simply that the peculiar language of section 10 ("or whenever such common carrier is a corporation, any director or officer thereof," etc.) was susceptible of an interpretation expressly and affirmatively excluding the corporation itself from prosecution. See *N. Y. C. & H. R. R. R. Co.* v. *U. S.* (No. 2), 212 U. S. 500, 504. This was a possible interpretation (*U. S.* v. *Mich. Cent. R. R. Co.*, 43 Fed. 26, 28; *In re Peasley*, 44 Fed. 271, 275), although this court never positively so decided, and see 15th Ann. Rep. of I. C. C., p. 7. The important point here, however, is that it was regarded as an *affirmative* exemption of the corporations themselves from indictment and the Elkins law was passed partly to overcome that interpretation. It is hardly to be doubted that if section 10 had not contained the alternative clause about corporate officers but had simply declared any "common carrier" doing any prohibited act to be guilty of a misdemeanor, that declaration, taken in

connection with section 1, under which the term "common carrier" includes railroad corporations, would have subjected corporations as such to indictment, just as corporations are indictable for violations of the food and drugs act, the safety-appliance act, and others, where the language is substantially analogous. That is precisely the situation which the Hepburn Act created with respect not only to those express companies that are corporations, but also to those that are joint-stock associations. There was no previous affirmative prohibition against the indictment of such associations. All that was necessary was a short clause saying that "common carriers" should include express companies, and that short clause was provided. Indeed, defendant's objection seems to be based on a theory of measuring legislative intention by the number of words used. This provision of the Hepburn Act was enough to reach precisely the same result with respect to express companies, whether in the form of corporations or joint-stock associations, that was brought about with respect to corporation carriers by section 1 of the Elkins law and section 10 of the original act combined.

Moreover, it was already settled policy at the time of the Hepburn Act that not only should the individuals who actually conducted the business of interstate transportation be held liable for violations of the Interstate Commerce law, but also that the business organization or artificial entity through the medium

of which and for whose benefit the individuals conducted the business should be held criminally accountable.

Prior to the Elkins Act it had worked out in actual practice that only natural persons could be reached by indictment. It having become desirable to reach the corporations as well, section 1 of the Elkins Act was passed in order to remove all doubt on this score and make it quite clear that such a remedy could be had. So it must be taken that three years later, when the Hepburn Act was passed, whatever controversy there had been on the question whether artificial business entities should be subjected to criminal action was closed. It was so much matter of course to reach the artificial entity in this way that the natural attitude of the legislature in framing new legislation was to proceed on this basis quite without thought that the other basis would ever occur to anybody.

(2) It is claimed that joint-stock companies are not generally subject to indictment as entities, and that therefore Congress can not have intended to make them so for the purposes of this act.

It is rather a late day to make this suggestion, for in the very respectable number of cases cited, *supra*, p. 1, the joint-stock association express companies, including the defendant, have been before this court even under indictment, and it seems never to have been thought or urged that there was anything improper in thus subjecting the com-

pany itself as a juridical person to a charge of wrongdoing.

And several of the States treat them generally as entities, precisely like foreign corporations.

Adams Express Co. v. *State*, 161 Ind., 706.
Adams Express Co. v. *State*, 161 Ind., 705.
Adams Express Co. v. *State*, 161 Ind., 328.
State v. *Adams Express Co.*, 66 Minn., 271.
Adams Express Co. v. *Schofield*, 111 Ky., 832.
Adams Express Co. v. *State*, 55 Oh. St., 69.
Com. v. *Adams Express Co.* 123 Ky., 720.
American Express Co. v. *People*, 133 Ill., 649.
United States Ex. Co. v. *State*, 164 Ind., 196.
State Commission v. *Adams Ex. Co.*, 19 L. R. A., 93.
Southern Express Co. v. *Com.*, 92 Va., 59 (affirmed, 168 U. S., 705).

And in many other cases actions against these companies as such were entertained with apparently no thought that there was anything anomalous in such a course. (*Adams Express Co.* v. *Ohio*, 165 U. S., 194; 166 U. S., 185.) If the States can secure remedies against these associations themselves, surely there is warrant enough to suppose that Congress would not overlook the chance of securing a like remedy in enforcing the provisions of the interstate-commerce act.

There are a number of useful analogies on this question. Joint-stock associations may be held liable for contempt of court. (*J. & P. Coats, Limited*, v. *Chadwick* (1894), 1 Chancery, 347.) They may be

held liable for torts, including fraud and libel. (*1 Lindley on the Law of Companies, 6th ed., pp. 267–268;* and *Van Aerman* v. *Bleistein,* 152 N. Y., 355; *Whitney* v. *Backus,* 149 Pa. St., 29.)

The English joint-stock company, though frequently spoken of there as a corporation, is essentially the same as the joint-stock association of this country. And there is no doubt of the attitude of the English courts toward the question whether such a company has such a separate existence that it may be subjected to penal action. (*Pharmaceutical Society* v. *London & Provincial Supply Association, Ltd.,* 5 Appeal Cases, 857; *Queen* v. *Tyler & Internatl. Commercial Co., Ltd.* (1891), 2 Q. B., 588; *Pearks, etc.,* v. *Ward* (1902), 2 K. B., 1; *Lawler* v. *Egan, Limited* (1901), 2 Ir., 589.)

(3) It is said, as if it had something to do with the question, that there must be a distinction between corporations and joint-stock associations with respect to the question of indictability for the reason that corporations are created by sovereign act, while a joint-stock association is merely the resultant of an agreement made among its members. It is difficult to see how this factor can have any substantial bearing on the question. It will scarcely be maintained that the fact that a business organization was formed simply by agreement could prevent the lawmaking power from recognizing it later as an entity of some sort distinct from the members who formed it. The question is one of the intent of the legislature. The

particular inquiry just now is as to the attributes of these associations after their formation.

(4) It is said that the legal status of this association under the law of New York, which is the home jurisdiction, precludes its indictment.

We do not consider the New York status to be of any particular moment, because Congress may make its own rule for purposes of interstate commerce; but we do not have to go to that extent, for even in that State these associations are really entities distinct from their shareholders.

It is difficult to find that there is any real distinction even in New York between the methods of formation of many corporations and of these joint-stock associations.

In that State three or more persons may become a stock *corporation* by signing and filing a certificate containing the name of the proposed corporation, the purpose of its formation, the amount of its capital stock, the number of shares, the amount with which the corporation will begin the business, the place of its principal business office, the number of its directors and their names, its duration, the names and addresses of the subscribers to each certificate, and the statement of the number of shares which each agrees to take. (Business Corporation Law, sec. 2, Birdeye's Cumming & Gilbert's Consolidated Laws of New York, vol. 1, p. 506.) The only other formality that is important here is that the certificate must be filed in the office of the secretary of

of state and by him recorded, and also in the office of the clerk of the county in which the office of the corporation is to be located; and taxes and fee for filing and recording must be paid. (General Corporation Laws, sec. 5, ibid., vol. 2, p. 1969.)

A joint-stock *association* is formed by writing out articles of association, which may provide that the death of a stockholder or the transfer of his shares of stock shall not work a dissolution of the association; that its directors, not less than three, may have the sole management of its affairs; and may contain any other provision for the management of its affairs not inconsistent with law. Each joint-stock association, within sixty days after its formation, must file with the secretary of state and with the clerk of the county in which its principal business is carried on, by each of whom it is to be recorded, a written certificate, stating the name and date of organization of the association, the number of its stockholders, the names and places of residence of its officers, and its principal place of business. (Joint Stock Association Law, Birdseye's Cumming & Gilbert's Consolidated Laws of New York, vol. 2, p. 2707–2708.)

So far as formation goes, then, no real difference is apparent between a corporation and a joint-stock association that has any bearing on the present question. (See *Eliot* v. *Freeman*, 220 U. S., 178.)

Nor are the qualities and attributes of a joint-stock association, even under the New York law such as to make indictment impracticable or inappropriate as applied to it.

What are these qualities? Among them are these (see New York Joint Stock Association Law):

(*a*) A joint-stock company does business under an artificial name.

(*b*) It does business through a board of directors or managers exercising the entire control of the management of the business.

(*c*) The interest of the shareholders in the business is represented by shares or certificates of stock.

(*d*) The association may hold real estate in the name of an officer designated by the statute.

But the important and decisive considerations here are these:

(*e*) The association may sue and be sued as an entity. That in New York suit must be brought by or against a designated officer of the company is a mere matter of procedure, for the judgment when obtained binds the joint property of the association and not the individual property of the officer designated. (*National Bank* v. *Van Derwerker*, 74 N. Y., 234.)

(*f*) The company may be sued by one of its own shareholders. (*Westcott* v. *Fargo*, 61 N. Y., 542.)

(*g*) The death or withdrawal of a shareholder does not work dissolution. (*In re Jones*, 172 N. Y., 575.)

Clearly the result of these considerations is that the association is a thing with a separate existence, capable of acts and responsibilities distinct from those which are to be ascribed to its members as members of the association. (See *Liverpool Ins. Co.* v. *Mass.*, 10 Wall., 566, 574.)

And the New York courts have in other cases consistently treated these associations as having an existence separate from that of its individual members.

Hibbs v. *Brown*, 190 N. Y., 167.
People v. *Coleman*, 133 N. Y., 279.
People ex rel. Platt v. *Wemple*, 117 N. Y., 236.
Van Aerman v. *Bleistein*, 102 N. Y., 355.
Waterbury v. *Merchants Union Ex. Co.*, 55 Barb. (N. Y.), 158.

And the New York constitution provides, in Article VIII, section 3, that:

> The term corporations as used in this article shall be construed to include all associations and joint-stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships. And all corporations shall have the right to sue and shall be subject to be sued in all courts in like cases as natural persons. (Birdseye's Cumming & Gilbert's Consolidated Laws of New York, vol. 1, p. 148.)

It is true, of course, that the members retain their individual liability. But this is quite consistent with the notion that the association itself has a separate existence. In this view the relation is simply one of suretyship.

(5) This characteristic of individual liability explains a line of cases in the Federal courts on which the defendant puts much reliance. These cases have

established the rule that joint-stock associations, unlike corporations, are not regarded as citizens for the purpose of determining the jurisdiction of Federal courts as based on diversity of citizenship. (*Chapman* v. *Barney*, 129 U. S., 677; *Great Southern Fire Proof Hotel Co.* v. *Jones*, 177 U. S., 449; *Thomas* v. *Board of Trustees*, 195 U. S., 207.) Under the rule of individual liability of the members it might well result that a judgment secured by an outside party against the association would have to be satisfied against persons who were all citizens of the same State as the judgment creditor. For this purpose therefore it is proper not to treat the association as a citizen. But it does not at all follow that such an association is not a juridical person for other purposes, and that Congress could not have intended to treat it as such. (See *Liverpool Ins. Co.* v. *Mass.*, *supra*, at p. 575.)

(6) It is said that a joint-stock association is not a corporation but a partnership, and that if it is indictable then it must follow that an ordinary partnership would be indictable under the firm name, as partnerships are "companies" in the legal sense. (8 Cyc., 399.) It is even urged that if a single person were doing business under the name of "John Doe Express Company," the Government must, as a result of its argument, contend that he could be indicted in that name and capacity.

It is confusing and of little value to argue here in such terms of labels. We think it quite imma-

terial whether a joint-stock association is called a quasi corporation, a qualified corporation, or anything of the sort. We do not argue that it is a corporation, although it is nearer that than anything else. And on the other hand it does not seem very important or necessary to deny that it is a partnership, although it certainly is not the ordinary partnership. If it is a partnership it is one with such peculiar traits that to think or speak of it commonly as a partnership would be misleading. Probably the best name is the one that is usually and naturally used, that is, joint-stock association or joint-stock company. But that is all aside. The only useful inquiry here is what are the qualities or attributes of these joint-stock associations in relation to the question whether they are intended to be subjected to indictment; and that question depends on whether a joint-stock association, such as the defendant, is really, in the intent of Congress, an entity or juridical person—a thing distinct from the members composing it.

Already, because of the Elkins law of 1903, corporations were indictable under section 10 when the Hepburn Act added "express companies." It is true that term might theoretically include ordinary firms and partnerships as well as corporations and joint-stock companies, but no great or substantial amount of interstate express business was so transacted and no reason is apparent for stretching the word "company" so far. The fact that it may not have been intended to indict an ordinary firm or

partnership as such does not at all show that it was intended to exempt corporations or joint-stock associations. On the contrary, by the use of the term "companies" in a generic sense, Congress must have intended that it should go as far as possible wherever applicable.

Whatever else was intended, it must have been intended that this generic word should include the most important species to which it would naturally refer, namely, the joint-stock association express companies.[1]

(7) The final objection is that Congress could not have intended to subject joint-stock associations to indictment because it did not lay down any new form of procedure to meet such a situation. But neither did Congress provide any particular form of procedure when corporations were made indictable. It was simply declared that corporations should in certain circumstances be guilty of a misdemeanor. The

[1] The Interstate Commerce Commission's First Annual Report on the Statistics of Express Companies in the United States shows just how great a factor the joint-stock association express companies were in the express business of the country. Thus, in 1909, the combined operating revenues of the four great joint-stock companies, the Adams, the American, the National, and the United States, were $78,722,248.54, as compared with the grand total of the revenues of all express companies amounting to $132,899,190.92 (p. 29). In other words, the joint-stock companies did considerably more than half the total express business of the country. Other analytical tables which may be found in this report of the Commission show in an equally graphic manner the commanding position which these companies have attained.

procedure, the style and form of the indictment, and of whatever writs were necessary, were left to be regulated by the courts under their judicial powers over such matters. (See § 262, Judicial Code; R. S., § 716.)

None of these matters, then, is of substance to show any probability or possibility that Congress intended not to have its general language cover the cases it purports to cover, and there is nothing, then, to justify a limitation of the language by construction.

SECOND POINT.

The act as so construed is constitutional.

N. Y. C. & H. R. R. Co. v. *U. S.*, 212 U. S., 481.

CONCLUSION.

The order should be reversed, and the cause remanded with appropriate instructions.

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LORING C. CHRISTIE, *Attorney.*

MARCH, 1913.

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Supreme Court of the United States,

OCTOBER TERM, 1912.

UNITED STATES OF AMERICA, *Plaintiff in Error*,

vs.

THE ADAMS EXPRESS COMPANY.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This was an indictment in eleven counts against the Adams Express Company, wherein it was stated that said company was a joint stock association organized and existing under and by virtue of the common law of the State of New York, and was engaged in the transportation of property by express as a common carrier, etc., in interstate commerce. The charge in each count was knowingly and wilfully charging, demanding, collecting and receiving a greater compensation for transportation of merchandise over defendant's lines in interstate commerce than the rate and charge specified in the schedules of rates filed with the Interstate Com-

merce Commission, contrary to the provisions of section 6 of the Act of Congress, approved February 4, 1887, entitled "An Act to Regulate Commerce," and the acts amendatory thereof. The court entered an order on motion of the United States attorney directing that a summons be issued for the defendant (R. 18). The summons was issued and returned into the office of the clerk with the following endorsement thereon:

> "Received this writ at Cincinnati, Ohio, on the 16th day of March, 1912, and on the same day I served the within named, the Adams Express Company, by delivering a true copy of this writ, with the endorsements thereon, to Charles F. Barrett, general agent for said company, by handing same to him personally at Cincinnati, Ohio" (R. 19).

Thereupon the following motion, entitled "Motion to set aside and quash marshal's return on summons," was filed in the clerk's office:

> "Charles F. Barrett, the person on whom service of the writ of summons in this case was served on the 16th day of March, 1912, as General Agent of the Adams Express Company, defendant herein, moves the court to set aside and quash said service and the marshal's return thereon on the ground that the same are not authorized by law.
>
> Maxwell & Ramsey,
> Attorneys for Chas. F. Barrett."

The motion was sustained, defendant discharged, and the cause dismissed. The order of the court entitled "entry" appears at page 20 of the record, as follows:

> "This day this cause came on to be heard on the motion of Charles F. Barrett to set aside and quash

the service of summons in this case and the marshal's return thereon.

Said motion was argued by counsel and submitted to the court, and the court being fully advised in the premises and treating said motion as a demurrer to the indictment, finds that the indictment cannot be maintained against the Adams Express Company for the reason that it appears on the face of said indictment that the said Adams Express Company is not a corporation, but is a joint stock association, organized and existing under and by virtue of the common law of the State of New York, and for this reason the motion to quash service, treated as a demurrer to the indictment, is sustained and the defendant discharged, and the cause dismissed; to all of which the United States of America, by its counsel, excepts."

Petition for writ of error was filed by the government together with assignment of errors and said petition was duly allowed by the District Court (R. 22).

I

The court has no jurisdiction to review the decision and judgment of the court below.

The right of the court to review a criminal case on writ of error by the United States is dependent on the Criminal Appeals Act of March 2, 1907, 34 Stat. 1246 c. 2564. Prior to the enactment of this statute it was held in United States vs. Sanges, 144 U. S. 310, that a writ of error does not lie in behalf of the United States in a criminal case. The granting of a writ of error to the government in such case was referred to by Mr. Justice Gray (p. 323) as a "serious and far-reaching innovation in the criminal jurisprudence of the

United States." See also Chapman vs. United States, 164 U. S. 436; Sinclair vs. District of Columbia, 192 U. S. 16, and Kepner vs. United States, 195 U. S. 100.

The Criminal Appeals Act of March 2, 1907, was construed and applied in United States vs. Patten, 226 U. S. 525. In the margin (p. 535) decisions of the court concerning the act were referred to.

In so far as material here it provides:

> "That a writ of error may be taken by and on behalf of the United States from the district or circuit courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to-wit:
>
> From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded.
>
> From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded.
>
> From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy."

It is settled that the act confers no jurisdiction on this court to review a criminal case generally on writ of error by the government, but only in so far as it involves the invalidity or construction of the statute upon which the indictment is based.

As said by Mr. Justice Day delivering the opinion of the court in United States vs. Stevenson, 215 U. S. 190, 195:

> "The object of the criminal appeals statute was to permit the United States to have a review of questions of statutory construction in cases where indictments had been quashed, or set aside, or demurrers thereto sustained, with a view to prosecuting offenses under such acts when this court should be of opinion that the statute, properly construed, did in fact embrace an indictable offense."

Statutes of the several states allowing appeals by the state in criminal cases are construed strictly so as to confine such appeals to the precise matters covered by the statute.

In State vs. Clipper, 142 Mo. 474, 44 S. W. 264, the court said:

> "The State is 'allowed an appeal *only* in the cases and under the circumstances mentioned in the next succeeding section.' These cases and circumstances are these, and no others; ***First***, where an ***indictment*** is quashed; ***second***, where it is adjudged insufficient upon demurrer; ***third***, where the judgment thereon is arrested.
>
> The following decisions of this court show how closely these statutory provisions have been limited by our rulings heretofore; State vs. Bollinger, 69 Mo. 577; State vs. Risley, 72 Mo. 609; State vs. Heisserer, 83 Mo. 692; State vs. Ashcraft, 95 Mo. 348, 8 S. W. 216; State vs. Rowe, 22 Mo. 328.
>
> On common law principles, the great majority of our courts deny to the State the right of appeal, etc., except when ***expressly*** allowed by statute, and a statute which bestows such right on the state is always ***construed strictly***"
>
> State vs. Adams, 193 Mo. 196, 91 S. W. 946.
> People vs. Higgins, 114 Cal. 63, 45 Pac. 1004.

People vs. Richter, 113 Cal. 473, 45 Pac. 811.
State vs. Evansville, etc., R. Co. 107 Ind. 581, 8 N. E. 619.
People vs. Snyder, 44 Hun. 193.
State vs. Moore, 84 N. C. 724.
State vs. Simmons, 49 Ohio St. 305; Mick vs. State, 72 Ohio St. 388.
State vs. Kemp, 5 Wash. 212, 31 Pac. 711.
State vs. Finstad, 16 S. D. 422, 93 N. W. 640.
People vs. Dundon, 98 N. Y. S. 1048, 113 App. Div. 369.

The words of the statute and the decisions construing it demonstrate that the government may have a writ of error to review a decision or judgment based on the construction of a criminal statute only when the decision or judgment quashes or sets aside an indictment or sustains a demurrer thereto, arrests a judgment or sustains a special plea in bar when defendant has not been put in jeopardy.

The present case does not fall within the statute. The defendant entered no appearance and filed no pleading in the court below. No motion to quash or set aside the indictment was filed by anyone, nor was a demurrer to the indictment submitted to the court. The cause was dismissed, but the decision or judgment dismissing it was not a decision or judgment quashing, setting aside or sustaining a demurrer to the indictment. The court treated the motion of Charles F. Barrett, to set aside and quash the return of the summons as "a demurrer to the indictment," but this was not at the request or with the consent of defendant, which was not in court at all, or even of Charles F. Barrett, who filed the motion to quash the return. The legal effect, for the pur-

poses of this case, of the entry of judgment in the District Court is not changed in any way by the recital therein that the court treated the motion to quash the return as a demurrer to the indictment. What the court actually did was to order the return quashed, the defendant discharged and the cause dismissed. The government is not allowed a writ of error to review a decision quashing a marshal's return, discharging a defendant or dismissing a cause. The writ of error runs only to correct such judgments and decisions of the lower courts as are expressly specified in the statute. If the Adams Express Company or some or all of its members had been in court, it or they or counsel might have moved to quash the indictment or demurred to it, and a decision sustaining such motion or demurrer might have been reviewable here, but in fact neither said company as a company, nor any of its members entered appearance or filed a pleading. The court had no authority to treat the motion of Charles F. Barrett to set aside service as a demurrer of the Adams Express Company, and by so doing confer jurisdiction on this court not provided for in the Criminal Appeals Act.

It is therefore submitted that the writ of error should be dismissed.

II.

The Adams Express Company is not a corporation but a Joint Stock Association or Co-Partnership.

The indictment alleges "The Adams Express Company was a joint stock association organized and existing under and by virtue of the common law of the State of New York,

etc." This is not an allegation that it is a corporation, but that it is a co-partnership. The rule is established in this court in cases where the jurisdiction as depending on diverse citizenship was involved.

In Chapman vs. Barney, 129 U. S. 677, which was an action in assumpsit instituted by the United States Express Company alleged to have been organized under and by virtue of the laws of the State of New York, and a citizen of that state, against a citizen of Illinois, the court held that there was no such diverse citizenship as to confer jurisdiction on the circuit court. At p. 682, Mr. Justice Lamar, delivering the opinion, said:

> "On looking into the record we find no satisfactory showing as to the citizenship of the plaintiff. The allegation of the amended petition is, that the United States Express Company is a joint stock company organized under a law of the State of New York, and is a citizen of that state. But the express company cannot be a *citizen* of New York, within the meaning of the statutes regulating jurisdiction, unless it be a corporation. The allegation that the company *was organized* under the laws of New York is not an allegation that it is a corporation. In fact, the allegation is, that the company is *not* a corporation, but a joint stock company—that is, a mere partnership. And, although it may be authorized by the laws of the State of New York to bring suit in the name of its president, that fact cannot give the company power, by that name, to sue in a federal court."

In Great Southern Fire Proof Hotel Company vs. Jones, 177 U. S. 449, the same rule was adopted as to a limited part-

nership association organized under a Pennsylvania statute. Mr. Justice Harlan, delivering the opinion, said, at p. 457:

> "That a limited partnership association created under the Pennsylvania statute may be described as a '*quasi* corporation,' having some of the characteristics of a corporation, or as a 'new artificial person,' is not a sufficient reason for regarding it as a corporation within the jurisdictional rule heretofore adverted to. That rule must not be extended. We are unwilling to extend it so as to embrace partnership associations."

In Platt vs. Colvin, 50 Ohio St. 703, the United States Express Company, while recognized as possessing some of the attributes of corporations, was held not to be a corporation but a co-partnership.

In Boston & Albany Railroad vs. Pearson, 128 Mass. 445, 446, Morton, J., said:

> "The question whether the New England Express Company, organized under the laws of the State of New York, was a corporation or a co-partnership, has been before the courts of this and other states in several cases; and it has been uniformly held that it was a co-partnership, and not a corporation. Taft vs. Ward, 106 Mass. 518, 111 Mass. 518; Bodwell vs. Eastman, 106 Mass. 525; Frost vs. Walker, 60 Maine 468. See also Westcott vs. Fargo, 61 N. Y. 542; Witherhead vs. Allen, 3 Keyes 562. The provisions of the statutes of New York in relation to such co-partnership, that suits shall be prosecuted in the first instance against the officers of that association, are provisions respecting the remedy; of local operation, not binding here; and the liability of the individual

partners may be here enforced according to the laws of this commonwealth. Taft vs. Ward, 106 Mass. 518; Gott vs. Dinsmore, 111 Mass. 45."

In Gregg vs. Sanford, 65 Fed. 151 (Circuit Court of Appeals, 3rd Circuit, 1895), the court said:

> "We, therefore, may affirm confidently that the Adams Express Company was not incorporated by or under the laws of the state of New York. It is not pretended that it was constituted a corporation elsewhere. The answer expressly admits that it was not incorporated by or under any law of the state of Pennsylvania. Upon what principle, then, can it be held to be taxable under acts which impose a tax upon the capital stock of incorporated companies? In truth the Adams Express Company was brought into being wholly by the contract of its individual members inter se, expressed in their articles of association, and was not of statutory origin."

Lindley on Companies, 5th Edition (1891), at p. 1, states:

> "A company which is neither incorporated nor privileged by the crown or the legislature is substantially a partnership; and although the transferability of its shares considerably modifies the application to it of the ordinary law of partnership, still the company, like an ordinary firm, is not in a legal point of view, distinguishable from the members composing it."

At p. 2 he says:

> "By the common law of this country every association of persons formed for the sake of sharing profits, is either a partnership or a corporation; and a company which is neither a corporation nor a part-

nership, is a thing unknown to the common law of England."

It is unnecessary to discuss whether and in what cases a joint stock association is legally or popularly regarded as an entity or juridical person, separate and distinct from the individuals composing it. The principle is firmly fixed in our law that a corporation is recognized by our courts as a separate legal person distinct from its members, for many purposes for which no other association of individuals is so recognized, including liability for infraction of the criminal law. As said by Judge O'Brien in the Supreme Court of New York in Feiner vs. Reiss, 98 App. Div. 40, 45:

> "We assume the general rule to be that no body of men can become associated together and can acquire the rights, privileges and obligations of a corporation without express legislative sanction. In other words, a corporation is the creature of the State, and every corporation owes its existence and its rights to incorporate to express legislative enactment. As said in the American and English Encyclopedia of Law (Vol. 7, 2nd Ed., p. 632): 'A corporation is a body created by law . . . . and possessed of a franchise by virtue of which it subsists as a body politic' and (p. 695); 'The powers of a corporation, like its corporate existence, are derived from the legislature. . . . Its charter, therefore, is the measure of its powers and it can lawfully exercise such powers only as are expressly or impliedly conferred by that instrument.' This principle is thus stated in Morawetz on Corporations (2d Ed., Sec. 316): 'The charter of a corporation serves a twofold purpose; it operates as a law conferring upon

> the corporators the right or franchise of acting in a corporate capacity, and furthermore it contains the terms of the fundamental agreement between the corporators themselves.' In Cook on Corporations (Vol. 1, 5th Ed., p. 3), it is said: 'A corporation can be created by or under legislative enactment and by that alone.' And upon this subject Chief Justice Marshall, in Dartmouth College vs. Woodward (4 Wheat. 636), said: 'A corporation is an artificial being, invisible, intangible and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it either expressly or as incidental to its very existence.' "

III.

The members of a Joint Stock Association may be sued or indicted, but not in the company name, unless a statute so provides.

A joint stock association is not a juridical person for purposes even of suing and being sued civilly without the aid of a statute which governs the forum in which the suit is sought to be maintained; in that respect it does not differ from an ordinary partnership.

As said by Circuit Judge Gray in Taylor vs. Weir, 171 Fed. 636, referring to Adams Express Company:

> "It is perfectly clear that the Adams Express Company, not being a corporation, but an unincorporated stock company or partnership, cannot, as such, have citizenship attributed to it as an entity, apart from that of its individual members, nor apart from special legislation, can they be made party de-

fendants by their partnership or stock company name."

In 23 Cyc. 469, under the title "Joint Stock Companies," it is said:

> "At common law these companies were regarded as commercial partnerships, and, in the absence of express provisions, statutory or otherwise, the rights and liabilities of their members are to be determined by substantially the same rules," citing cases.

At page 477 it is said:

> "In the absence of statutory regulation all the members are proper and necessary parties to an action either by or against a joint stock association."

In Van Aernam vs. Bleistein, 102 N. Y. 355, Judge Rappalo, in speaking of the character of joint stock companies, said:

> "Prior to 1849, all the members of an unincorporated joint stock company or association were necessary parties to an action by or against such company or association, whatever the number of its members might be. (2 Lindl. on Part. 1084). Such an association could not sue in the name of any officer of the association or in the name of its trustees."

And, although, as pointed out by the court in that case the statute of 1849 permitted such associations, consisting of seven or more members, to sue and be sued in the name of an officer, the statute does not change the nature of the organization; it is a "provision respecting the remedy; of local operation, not binding here" (Boston & Albany Railroad vs. Pearson, 128 Mass. 445).

In Moore vs. Brink, 4 Hun. 402, Judge Mullin in the Supreme Court of New York, speaking of the status of joint stock associations at the time of the enactment of the law of 1849, said:

> "At that time joint stock companies, unless exempted by some special law, were mere partnerships, and must have been proceeded against as such. And if one of the partners died, the creditor must proceed against the surviving members before an action could be maintained against the representatives of the deceased partner (See cases collected in 4 Abbott's Digest, 738, 739, Secs. 397-405)."

In St. Paul Typothetae et al. vs. St. Paul Bookbinders Union et al., 94 Minn. 352, 102 N. W. 725, 3 Am. & Eng. Annotated Cases, 695, the question involved was whether the plaintiff, an unincorporated association, could maintain an action in its associate name. The court said, at 94 Minn., p. 357:

> "But whatever may be the law applicable to such associations generally, there is one respect in which the authorities are agreed, and that is that at common law they are not, whether organized for business or other purposes, entitled to recognition in the courts in their association name. It is well settled that, in the absence of a statute otherwise providing, to be entitled to conduct judicial proceedings in court, a party litigant must be either a natural or artificial person. The rule is correctly stated in 22 Enc. Pl. & Pr. 230, where, in speaking of unincorporated societies, such as those here involved, it is said that such societies cannot maintain an action in their association name, but must sue in the name of the individuals composing them, however numerous they

> may be. Such societies, in the absence of statutes recognizing them, have no legal entity distinct from that of their members. The rule is followed by an unbroken line of authorities, though a different rule has been applied in many of the courts in actions purely of an equitable nature" (citing cases).

The editors of the American and English Annotated Cases, at the end of the opinion in the above case, append a page of notes containing the citation of many authorities. The substance of the same is contained in the first paragraph on page 699, Vol. 3, as follows:

> "Right of unincorporated association to sue in association name in absence of permissive statute. The common law status of an unincorporated association, so far as the bringing of actions is concerned, is nothing more nor less than that of a partnership. Bacon vs. Dinsmore (Supm. Ct. Gen. T.), 42 How. Pr. (N. Y.) 368. 'None but a natural or artificial person can become a party to a suit' and an unincorporated association is neither. Nightingale vs. Barney, 4 Greene (Iowa), 106. Accordingly it is held that, in the absence of statutory authority, an action by an unincorporated association or society cannot be brought in the name of the association, its agents or trustees, but is maintainable only in the names of all its members."

In Romona Oolitic Stone Co. vs. Bolger, et al., 179 Fed. 979, it is held by District Judge McPherson to be the well established rule that in the absence of statutory provision a partnership cannot be sued as such, but that all partners are necessary parties.

In Pearson vs. Anderberg, et al., 28 Utah, 495, 80 Pac. Rep. 307, it is held:

> "A voluntary association cannot be sued in its name as such, but can be brought in court only in the names of its members, or, if they are too numerous, a few of them may be made defendants to represent the interests of all."

In Standard Oil Co. vs. Commonwealth, 122 Ky. 440, 91 S. W. 1128, the Court of Appeals of Kentucky said:

> "A reversal is sought because the Commonwealth failed to prove that the appellant was a corporation. It is averred in the indictment that it is a corporation. Such an averment was essential to the validity of the indictment. Robertson's Criminal Law, Vol. 2, p. 1036. If the Standard Oil Company was a partnership, it would have been necessary to proceed against the members comprising the firm, as no valid judgment could be rendered against the name under which they conducted the business."

In Peterson & Fitch vs. The State, 32 Texas, 477, in which defendants were indicted as a partnership for selling liquors without a license, the supreme court of Texas said:

> "We will say here that the indictment was void. The defendants should have been indicted as individuals, and not as a partnership firm."

It is clear, therefore, in the absence of an enabling statutory provision, that a joint stock association cannot sue or be sued or prosecuted by indictment or otherwise in its associate name.

There is no statute of the United States which authorizes the institution of an action by or against a joint stock

company in its associate name, or authorizes the prosecution of such a company by indictment in its associate name.

Whatever authority may be granted to the members of the Adams Express Company by the statutes of New York to sue or be sued in that name or in the name of the president or treasurer is not material here. State statutes cannot authorize a criminal proceeding against such members by the company name in the federal court for violation of the laws of the United States, any more than they can endow artificial citizenship for purposes of jurisdiction in civil cases in the federal courts depending on diverse citizenship.

The rules of pleading and practice in criminal cases in the United States courts, except as modified by statute, are the rules of the common law as of the year 1789. United States vs. Reid, 12 How. 361; United States vs. Maxwell, 3 Dill. 275; United States vs. Nye, 4 Fed. 888; Erwin vs. United States, 37 Fed. 470, 488; Withaup vs. United States (C. C. A. Eighth Circuit), 127 Fed. 530.

It is inconceivable that the definition of an indictable juridical person under the laws of the United States should be prescribed and governed by state law, common or statutory, and vary with the laws of the several states. If this were the rule, then a state by requiring suits against the members of a joint stock association to be prosecuted in the name of the association, could prevent the United States from prosecuting the individual members for violation of the criminal laws of the United States.

In Logan vs. United States, 144 U. S. 263, at 283, Mr. Justice Gray, delivering the opinion of the court, said:

> "Upon this question, the court has no doubt. As was said by Chief Justice Marshall, in the great case of McCulloch vs. Maryland, 'The Government of the Union, though limited in its powers, is supreme within its sphere of action.' 'No trace is to be found in the Constitution of an intention to create a dependence of the government of the Union on those of the States, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the Constitution.' 4 Wheat. 316, 405, 424."

At page 301, referring to the Judiciary Act of September 24, 1789, C. 20, Sec. 34, which provided "That the laws of the several states, except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply," he quoted the language used by Mr. Justice Taney in United States vs. Reid, 12 How. 361:

> "But it could not be supposed, without very plain words to show it, that Congress intended to give to the States the power of prescribing the rules of evidence in trials for offences against the Unites States. For this construction would in effect place the crimi-

> nal jurisprudence of one sovereignty under the control of another. It is evident that such could not be the design of this act of Congress.' 'The law by which, in the opinion of this court, the admissibility of testimony in criminal cases must be determined, is the law of the State, as it was when the courts of the United States were established by the Judiciary Act of 1789.' 'The courts of the United States have uniformly acted upon this construction of these acts of Congress, and it has thus been sanctioned by a practice of sixty years.' "

The government cites civil and criminal cases in this and other courts to which such companies have been parties in their associate name.

The Adams Express Company vs. Iowa, 196 U. S. 147, was an indictment in a court of Iowa against "The Adams Express Company" for selling liquor contrary to the laws of Iowa. The indictment contained no allegation as to the organization of the express company. There was no assignment of error in this court that the indictment as worded did not lie. The company relied solely on the Interstate Commerce clause of the Constitution.

Adams Express Company vs. Kentucky, 206 U. S. 129, was an indictment against "Joe Newland and Adams Express Company, the latter being a partnership engaged in and carrying on the business of a common carrier, etc."

Adams Express Company vs. Kentucky, 206 U. S. 138, was an indictment against "J. A. Owens, William Dedden and The Adams Express Company, the latter being a joint stock company and partnership."

American Express Company vs. Kentucky, 206 U. S.

139, was a warrant out of a police court against "The American Express Company," which did not charge the nature of its organization in any way.

Whether the company was properly indicted as such in any of these cases did not raise a federal question and was not suggested or discussed.

In these cases the agents of the express company were indicted with the company under its company name. Neither the company nor its members questioned the power of the court to sustain the indictment in that name, leaving the agent to be punished alone for business of the company done by him, but chose rather to take the judgment of this court on the merits of the case. In addition, a Kentucky statute specifically provides that the word corporation as used in the statutes of Kentucky "may be construed as including any corporation, company, person, persons, partnership, joint stock company or association." (Sec. 457).

Adams Express Company vs. Schofield, 111 Ky. 832, 64 S. W. 903, was a civil suit involving a question of the validity of service of process under a state statute. The court held:

> "Under Const. Sec. 208, providing that 'the word corporation as used in this constitution shall embrace joint stock companies and associations,' and Ky. St. Sec. 457, providing that 'the words corporation, company, may be construed as including any corporation, company, person, persons, partnership, joint stock company or association'—an association of 3,000 members will be treated as a quasi-corporation for the purpose of service of process."

In Commonwealth vs. Adams Express Co. 123 Ky. 720, 97 S. W. 386, it was held that the rule of Adams Express Co. vs. Schofield, governed only service of process, and that the statutes of Kentucky applied in that case were not applicable to an indictment against the company in that name for failure to file a statement required by the Kentucky statutes to be filed by corporations, the court saying: "These associations are in legal effect partnerships, although they are treated as quasi corporations for the purpose of serving process on them."

Adams Express Co. vs. State, 55 Ohio St. 69, also involved merely the question of proper service of process on that company by serving an agent. In so far as the opinion in that case suggests that a joint stock association is in law a corporation, it is erroneous.

In American Express Co. vs. People, 133 Ill. 649, 24 N. E. 758, which was an action to recover a penalty, the record shows that it was agreed that "the American Express Company, is a corporation."

Adams Express Company vs. Ohio State Auditor, 165 U. S. 194, 166 U. S. 185, cited by counsel for the government, is the title adopted by the reporter, as appears by the foot note in 165 U. S. 194, for a series of cases the docket titles of which in this court were "Henry Sanford, President of the Adams Express Company, appellant vs. Ebenezer W. Poe, Auditor of the State of Ohio et al.," and other similar titles with respect to the cases brought by the presidents of other express companies. They were bills in equity brought by individuals who alleged that the companies were co-partnerships consisting of very many partners, all of whom had

a joint ownership and interest in the cause of action set forth, but that they were too numerous to be joined as parties and that the complainant brought the suit as one of the partners and president on behalf of the other partners, who were too numerous to be joined as complainants. The jurisdiction of the court was based on diverse citizenship of the parties named. It was the ordinary case of a complainant suing on behalf of himself and others who were too numerous to be joined. Fargo vs. Hart, 193 U. S. 490, might, with equal propriety, have been entitled by the reporter American Express Company vs. Indiana. At p. 495, Mr. Justice Holmes, delivering the opinion, said that 'the bill was brought by the president of the American Express Company, a joint stock company of New York, on behalf of himself and the other members of the company to enjoin the auditor of the State of Indiana from certifying an assessment for 1898 to the auditors of the several counties of the state."

In Adams Express Company vs. Indiana, 161 Indiana, 328; Adams Express Company vs. Indiana, 161 Indiana, 705, and Adams Express Company vs. Indiana, 161 Indiana, 706 (67 Northeastern 1033), it was held that a penal action could be maintained by the state against "Adams Express Company" in that name, under the provisions of a special statute, the court saying:

> "Section 2 of the act of March 29, 1879, entitled "An act in relation to foreign express companies," etc. (Acts 1879, p. 146; section 3307, Burns' Rev. St., 1901), provides that all such co-partnerships, associations of persons, joint stock associations,

> or companies shall file in the office of the recorder in each county in which their business is conducted, or where they may have an agency or office, a statement setting forth the name of such co-partnership, association of persons, etc. Section 3 of the same act declares that all such co-partnerships, associations of persons, joint stock associations or companies may sue and maintain suits, and be sued and defend suits, in and by the name set forth in the statement required to be filed and recorded by the said act. This provision is a general one, and applies not only to suits brought by citizens or residents of this state having claims against such co-partnerships, etc., engaged in the business of common carriers as express companies, arising out of transactions in this state with any agent or employe of such co-partnership, etc., referred to in section 2 of the act, but to all other actions, however arising, in which the co-partnership, etc., is either the plaintiff or the defendant. It is by virtue of this section alone that an unincorporated association of this character can maintain an action in the courts of this state in its trade name. Under these two sections, the appellant was described as a co-partnership, under the name of the "Adams Express Company," engaged in the business of a common carrier, and was properly sued in its name of the Adams Express Company. The motions to quash the writ of summons, and to set aside the service of the same, was properly overruled."

Southern Express Company vs. Com. 92 Va. 59, has no bearing. Southern Express Company, as shown by the statement of facts in the case, is a corporation under the laws of Virginia.

Therefore the government relies on two classes of cases as authority. First, prosecutions or actions in state courts under statutes specially authorizing suits against joint stock association express companies in the company name. Such statutes may make joint stock associations juridical persons for certain purposes in respect of the laws of the state, but cannot provide a rule to govern prosecution of the members thereof in the company name in a United States court for violation of a criminal law of the United States. The second class of cases, of which, however, United States vs. Adams Express Co. 119 Fed. 240, is the only one that involved an indictment for violation of a law of the United States, are those in which the question was not raised. They are governed by the rule of Louisville Trust Company vs. Knott, 191 U. S. 225, in which the court held as stated in the second syllabus:

> "This court need not consider itself bound as to a question of jurisdiction because it may have exercised jurisdiction in a case where the question might have been raised but passed sub silentio. United States vs. More, 3 Cranch, 159, 172."

In United States vs. Sanges, 144 U. S. 310, the court dismissed for want of jurisdiction a writ of error sued out by the United States in a criminal case and allowed by the presiding justice. In answer to the argument that the court had several times taken jurisdiction of similar cases, Mr. Justice Gray said, at p. 321:

> "The exercise of jurisdiction over those cases on writ of error is therefore entitled to no more weight by way of precedent than the exercise of appellate

jurisdiction sub silentio in the cases, cited above, of United States vs. Simms, 1 Cranch, 252, and Cannon vs. United States, 116 U. S. 55."

In Pollock vs. Farmers Loan and Trust Company, 157 U. S. 429, 574, Chief Justice Fuller said:

> "Doubtless the doctrine of stare decisis is a salutary one and to be adhered to on all proper occasions, but it only arises in respect of decisions directly upon the points in issue."

IV.

Neither the Elkins Act of February 19, 1903, nor the Hepburn Amendment of June 29, 1906, makes the members of a Joint Stock Association Express Company indictable in the company name.

This prosecution is without precedent, except United States vs. Adams Express Company, 199 Fed. 321, where a similar action was upheld in the district court for the Western district of New York since the decision in the court below. It is argued now by the Government that the Hepburn Amendment of June 29, 1906, taken in connection with the Elkins Act of February 19, 1903, are sufficient to authorize an indictment against "The Adams Express Company."

The first paragraph of section 10 of the Act to Regulate Commerce as it has stood since the amendment of March 2, 1889, reads as follows:

> "That any common carrier subject to the provisions of this Act, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person, acting for

or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this Act prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing in this Act required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this Act to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this Act, or shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense: Provided, that if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges, for the transportation of passengers or property, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court."

This is the section upon which the indictment is based.

It was decided shortly after the passage of the act that a corporation common carrier by railroad, while undoubtedly subject to the provisions of the act, could not be indicted for a violation of section 10, and that only individuals, or when a common carrier was a corporation, directors, officers, and agents thereof were subject to the penal provisions of section

10. United States vs. Michigan Central Railroad, 43 Fed. 26, 28; Re Peasley, 44 Fed. 271, 275.

In New York Central Railroad vs. United States, 212 U. S. 481, 495, Mr. Justice Day, delivering the opinion of the court said:

> "It is a part of the public history of the times that statutes against rebates could not be effectually enforced so long as individuals only were subject to punishment for violation of the law, when the giving of rebates or concessions enured to the benefit of the corporations of which the individuals were but the instruments. This situation, developed in more than one report of the Interstate Commerce Commission, was no doubt influential in bringing about the enactment of the Elkins Law, making corporations criminally liable."

The Government states that it was a "possible interpretation" of section 10 to hold that corporations were not indictable thereunder. The interpretation was adopted by two circuit courts, not dissented from by any court and recognized by Congress in the passage of the Elkins Law. The material portion of section 1 of the Elkins Law reads:

> "That anything done or omitted to be done by a corporation common carrier, subject to the act to regulate commerce and the acts amendatory thereof, which if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said acts or under this act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties

as are prescribed in said acts or by this act with reference to such persons, except as such penalties are herein changed."

Manifestly this provision of the Elkins Law has no application to a common carrier that is not a corporation.

The Interstate Commerce Act as shown by section 1, when originally enacted, applied to a very limited class of instrumentalities, which at common law and under the decisions of many courts in the United States, were common carriers. It did not include those carriers whose business consisted in the operation and management of pipe-lines, telegraph, telephone, and cable lines or express and sleeping-car lines. That it did not apply to common carriage by express was decided in In re Express Company, 1 I. C., R. 456; United States vs. Morsman, 42 Fed. 448, and Southern Indiana Express Co. vs. United States Express Co., 88 Fed. 659, 92 Fed. 1022, on the ground that the express business was not transportation wholly by railroad.

What the act applied to and what it did not apply to was not in any way based upon the nature of the organization of the persons engaged in the several kinds of common carriage, but related strictly to the kinds or class of business in which they were engaged, that is, it was a regulation imposed upon the business of carriage by railroad or partly by railroad and partly by water under a common control and management. It is also clear that when the law was originally enacted, any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad or partly by railroad and partly by water under a common control or management were subject to its provisions,

whether such person or persons were so engaged as individuals, partnerships, joint stock associations or corporations. While Congress dealt with only a limited kind of common carriage it extended the provisions of the act to all persons engaged in that common carriage. But the act did not undertake to define who the "common carrier" was, when several persons associated themselves together; or to specify in what kind of association persons could relieve themselves individually from the penalties of the act and shift them onto the name or entity in which they did business, except to the extent of providing that a railroad corporation was not criminally liable.

Section 1 as amended by the Hepburn Act of June 29, 1906, extended the application of the law to the business of managing or operating pipe-lines and express and sleeping-car lines. The language used for this purpose was as follows (Ch. 3591, 34 Stat. 584):

> "That the provisions of this Act shall apply to any corporation, or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe-lines, or partly by pipe-lines and partly by railroad, or partly by pipe-lines and partly by water, who shall be considered and held to be common carriers within the meaning and purpose of this act, etc. . . . . ."
>
> "The term 'common carrier' as used in this act shall include express companies and sleeping-car companies."

By the amendment of June 18, 1910, Ch. 309, it was provided:

> "That the provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe-lines, or partly by pipe-lines and partly by railroad, or partly by pipe-lines and partly by water, and to telegraph, telephone, and cable companies (whether wire or wireless), engaged in sending messages from one State, Territory or District of the United States, to any other State, Territory or District of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of this Act, etc."

Thus the term "common carrier" as originally used in the Act, included a person or persons, firms, co-partnerships, joint stock associations and corporations engaged in interstate railroad traffic and was extended by the amendment so that it now includes each and all of such persons, associations, corporations, etc., engaged in the interstate pipe-line business, interstate railroad business and interstate express or sleeping-car business and interstate telegraph, telephone and cable business. The government considers it "important to observe that the provision is that 'the term common carrier as used in this act shall include ***express companies***,' not that express business shall be subject to the act, or some such phrase" (p. 7).

We contend that the several amendments extended the application of the act to various kinds of common carriage other than those originally included, but did not extend or change the application of the act as affected by the personnal or particular form or organization adopted by the persons engaged in the several kinds of common carriage covered

by the act from time to time. When Congress used the word "companies" in the amendments of 1906 and 1910 it had in mind no legal distinction between "company" and "corporation," and had no intention of creating a new juridical person to be indicted under an artificial name. A contrary conclusion leads to various absurdities.

It assumes that the term "any common carrier" as originally used did not include all the various and known forms by which men might engage and associate themselves together for the operation of the business covered by the original act, and that Congress provided that the term common carrier should include "express, etc., *companies*." in order that thereafter such companies when they were joint stock associations might be indicted in that name. If Congress had such an intention it would have been easy to express it in some such language as that contained in Senate Bill 6495, introduced by Senator Rayner, April 4, 1912, which reads:

> "Be it enacted, etc., That whenever in any proceeding, civil or criminal, under any act of Congress, it shall be ascertained that the defendant or any party to the proceeding is a joint stock association and has not been chartered or incorporated, it shall be sufficient to describe the said defendant or the said party to the proceeding by the name by which it is usually known or under which it transacts its business, and it shall not be necessary to name or designate the individuals who comprise the said association; and all indictments that may be found against any such joint stock association shall be sufficient, if otherwise valid, if they designate the defendant as a joint stock association, by the name by which it is usually known or under which it transacts its business, without

setting forth the names of the individuals who compose it or the names of the stockholders thereof."

To argue that by the amendment of June 29, 1906, Congress intended to make a joint stock association express company criminally liable in the company name necessitates another assumption which we have no right to make, namely, that Congress intended to relieve the individual members of such association from criminal liability. This is necessarily so because section 10 subjects to the penalties of the act only the "common carrier," and when such common carrier is a corporation, the directors, and officers thereof. The Elkins Act of February 19, 1903, also makes the corporation common carrier criminally liable, but it cannot be contended that the provisions governing corporations and their officers have any application here. Therefore the question in every case under section 10 is; Who is the carrier?

When individuals engage in a business covered by the act as a co-partnership it is the individuals and not an artificial entity which is the common carrier. When individuals associate themselves together in a corporation and secure a charter from the state the corporation is the common carrier. When individuals, whether few or many, associate as a joint stock association, they are the common carriers, unless there is a rule of law which merges their personal identity in that of a juridical entity.

The government contends that our interpretation of the act creates an artificial distinction between express companies which are joint stock associations and those which are incorporated (Brief, p. 9). The distinction between them is not artificial, but real, resting on essential differences. It is the government's construction that introduces

incongruous distinctions. If the government's contention is correct, and the words "any common carrier" in section 10 are to be read "any express company," then "The Adams Express Company" may be indicted and fined as the common carrier, but its directors, officers and agents cannot be imprisoned because they are not the directors, officers and agents of a corporation, and its members cannot be imprisoned because they are not common carriers, their identity being merged in that of the company. On the other hand the directors, officers and agents of incorporated express companies can be imprisoned, and the corporation fined under the Elkins Law.

If the government's construction be applied to the Amendment of June 18, 1910, joint stock associations engaged in interstate telegraph and telephone business would be indictable as such, because the act states that the provisions thereof shall apply "to telegraph, telephone and cable companies . . . . who shall be considered and held to be common carriers within the meaning and purpose of this act, etc.;" but joint stock associations "engaged in the transportation of oil, or other commodity . . . . by means of pipe-lines," would not be so indictable, because the provisions of the act are made applicable only to "any corporation or any person or persons" engaged in that kind of transportation. In other words, if persons associate themselves together as a joint stock association to engage in interstate telegraph business they are not indictable at all but the company is, and nobody can be imprisoned, whereas if they associate themselves as a joint stock association to engage in the pipe-line business the company is not indictable, but

only the "person or persons" are, and they may be fined and imprisoned.

If this indictment can be maintained, there is no reason why two or more persons who hereafter engage in the interstate express, telephone, telegraph, etc., business may not be indicted by the name under which they do business. In fact, if the government's contention is correct they must be so indicted, because they as individuals and the "company" as such cannot alternately be the "common carrier" at the government's option. It is no answer to this argument to say "these joint stock companies" have attained the dignity of an entity or juridical person (government's brief, p. 21). If size or number of members alone could confer a new legal persona, we have no allegation in the indictment on that subject. If the statutes of New York create it an entity their application is negatived by the allegation that this association was organized under the common law.

At p. 18 of the government's brief many qualities possessed by joint stock associations under the laws of New York similar to those possessed by corporations are referred to. But it is not alleged in the indictment that "The Adams Express Company" is a joint stock association under those laws or possesses their particular qualities. If it were alleged it might be argued that except for the provisions governing civil suits, all of the peculiarities referred to arise, or may arise, in ordinary partnership by agreement. Which of these provisions in an agreement between partners or articles of association must be present before the partners lose their identity and the new legal entity appears? Are the partners the common carriers as long as they use their own names, and does the artificial name become the carrier

when they adopt it? Does a provision in their agreement that two or more of them shall act as a board of directors, create the entity? Does an agreement to represent their interests by shares have that effect? Does a State statute, which provides for civil suits against them in the name of an officer, create a juridical person responsible in a criminal court of the United States in their place and stead?

If there be any fair doubt of the application of a criminal statute it must be resolved in favor of the accused; United States vs. Clayton, 2 Dill. 219; United States vs. Wiltberger, 5 Wheat. 76, 95; Smith vs. Townsend, 148 U. S. 490, 497; France vs. United States, 164 U. S. 676; United States vs. Biggs, 157 Fed. 264. In Commonwealth vs. Adams Express Company, 123 Ky. 720, 97 S. W. 386, this principle was applied in a case which held that a joint stock association was not subject to a penalty imposed on a corporation. The court said:

> "Laws which create crimes should be sufficiently explicit that men subject to their penalties may know what acts are forbidden, and before a man can be punished, his case must be plainly within the statute. U. S. vs. Lacher, 134 U. S. 628. Crime is not to arise upon doubtful construction of a statute . . . . Criminal statutes are not cunningly and darkly framed to catch the unwary, etc."

Conclusion.

It is not denied that interstate express carriers, whether corporations, individuals or co-partnerships, are subject to the regulations imposed by the Interstate Commerce Act and to the jurisdiction of the Commission, but when they are charged in the courts with criminal offenses, the proceedings

must be in accordance with fundamental principles of criminal law and procedure. The Interstate Commerce Act does not deal with that subject; we are remitted to the rules of the common law, and to the Criminal Code of the United States. Under those rules corporations may be indicted, for they are juridical persons distinct from their members. Section 337 of the Criminal Code provides that "the word 'person' and the word 'whoever' include a corporation as well as a natural person." But no statute of the United States provides for or authorizes the indictment of the members of a joint stock association or co-partnership in the association or firm name, or for impleading them in that name in civil suits or in criminal prosecutions in the courts of the United States.

The general law recognizes only two classes of persons as subject to criminal prosecution, namely (1) natural persons who by associating themselves into co-partnerships, associations and joint stock companies do not lose their identity and have substituted for their personal criminal responsibility that of a new juridical entity, and (2) corporations, which by their creation under the act of a sovereign state absorb the identity of those who unite in their formation, and may be criminally liable if a particular statute imposes its sanction upon them.

Respectfully submitted,

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